

INDIANA LAW REVIEW

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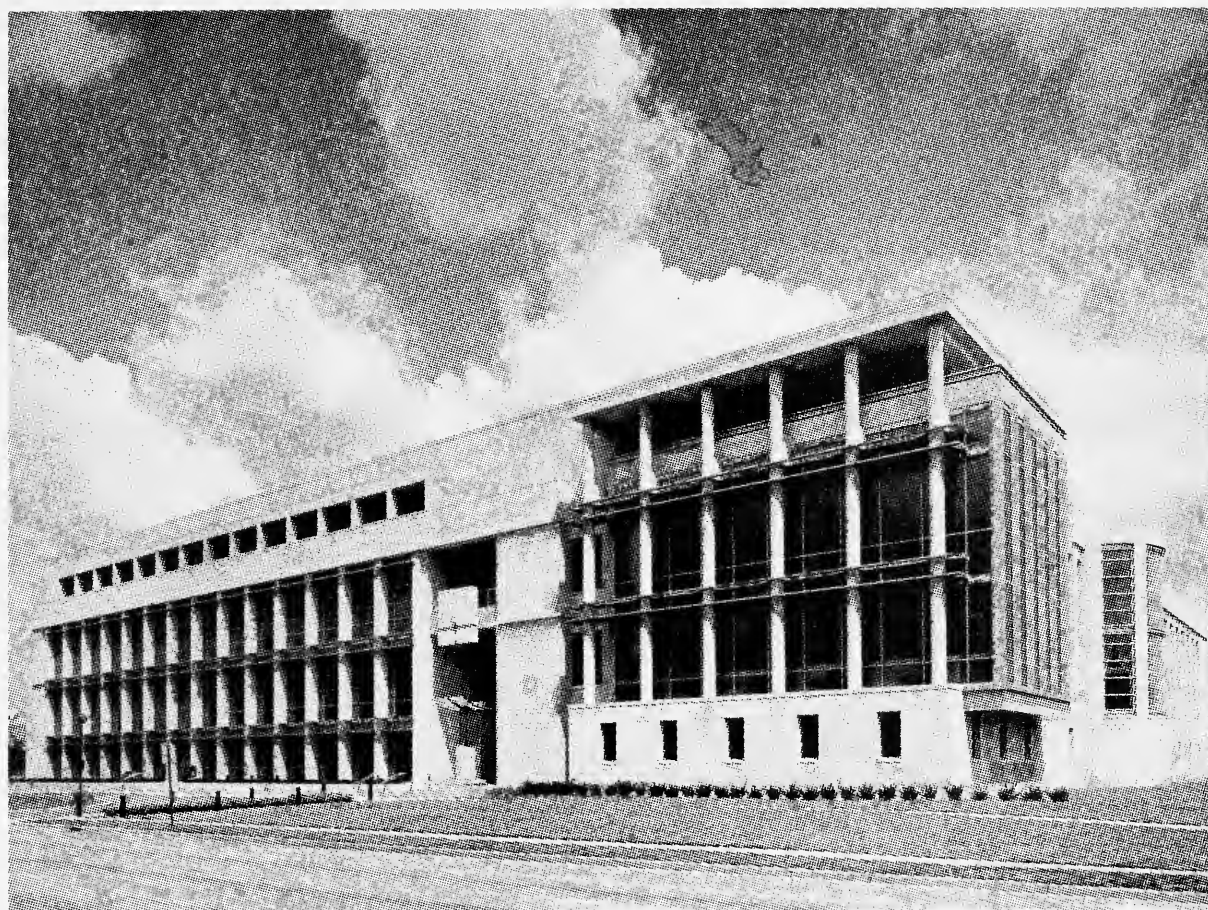
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M. DALE PALMER LECTURE

THE POETIC JUSTICE OF IMMIGRATION

LINDA KELLY HILL *

INTRODUCTION

Amnesty. The Rule of Law. Sanctuary Cities. Anchor Babies. The Path to Citizenship. These words and phrases evoke powerful emotions. They create vivid, perhaps blinding images which may be so provocative, so incendiary, that once such terms are introduced and attached to one position or another in the immigration debate, the discourse is over. There is neither the room nor the patience for any further dialogue. My comments today focus on this use of rhetoric as a weapon or a tool in our ongoing immigration debate.

Oftentimes, rhetoric, like these rhetorical terms used in the immigration context, receives a negative stigma, a bum rap. Rhetoric may readily be described as “the undue use of exaggeration or display; bombast.”¹ Yet this fifth definition of rhetoric set out by *Random House Dictionary* is preceded by a more positive definition of rhetoric as “the ability to use language effectively.”² However, this definition simply begs the question: what does it mean to use language effectively?

I would like to focus on the United States Court of Appeals for the Seventh Circuit (Seventh Circuit), and, in particular, on Judge Richard Posner’s use of rhetoric in the immigration context. Why study the Seventh Circuit and Judge Posner’s use of rhetoric in the immigration context? Three immediate, albeit somewhat superficial explanations can be offered. For one, it’s fun. Judge Posner is highly regarded for his judicial opinions. He is also well known for his academic writings³ and has written specifically on the use of rhetoric.⁴ Wouldn’t

* M. Dale Palmer Professor of Law, Indiana University School of Law, Indianapolis. This Article is based on my M. Dale Palmer Lecture, Indiana University School of Law, Indianapolis, March 27, 2008. Many thanks to Elizabeth Allington, the Executive Committee of the Indiana University School of Law, Indianapolis (2005-2006), the *Indiana Law Review*, Jonna Kane MacDougall, former Interim Dean Susanah Mead, Dean Gary Roberts, and the Trustees of Indiana University for making this possible.

¹RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE: THE UNABRIDGED EDITION 1229 (1967).

²*Id.*

³Judge Posner has contributed extensively to the legal literature. The Library of Congress Catalog lists over sixty titles authored or co-authored by Judge Posner. See <http://catalog.loc.gov/>

it be fun to see whether Judge Posner puts his judicial pen where his scholarly mouth is? A second reason is more practical: to the extent lawyers are practicing within the Seventh Circuit, perhaps some valuable insights can be gleaned from considering how judges on the Seventh Circuit rely upon rhetoric in crafting their opinions relating to immigration law.⁵ This utilitarian rationale is well supported by a third consideration: within the last several years, the Seventh Circuit has been amongst the most active circuits in the immigration field. In 2005, Judge Posner disclosed that the Seventh Circuit had reversed administrative immigration decisions in whole or in part in a “staggering” 40% of the petitions for review filed in the preceding year.⁶ In a five-month period

(last visited Feb. 9, 2009). Lexis/Nexis lists over one hundred articles, essays and book reviews authored or co-authored by Judge Posner. See <http://lexis.com> (last visited Feb. 9, 2009). While Judge Posner may be best known for his law and economics literature, he writes on a broad range of subjects.

Some of his books include: RICHARD A. POSNER, *BREAKING THE LAW* (1996); RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* (2004); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007); RICHARD A. POSNER, *HOW JUDGES THINK* (2008); RICHARD A. POSNER, *NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY* (2006); RICHARD A. POSNER, *SEX AND REASON* (1992).

For a broad sampling of his sole-written law review contributions, see, e.g., Richard A. Posner, *Bork and Beethoven*, 42 STAN. L. REV. 1365 (1990); Richard A. Posner, *Bush v. Gore: Prolegomenon to an Assessment*, 68 U. CHI. L. REV. 719 (2001); Richard A. Posner, *Clinical and Theoretical Approaches to the Teaching of Evidence and Trial Advocacy*, 21 QUINNIPIAC L. REV. 731 (2003); Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735 (2006); Richard A. Posner, *The Depiction of Law in The Bonfire of the Vanities*, 98 YALE L.J. 1653 (1989); Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921 (1993); Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311 (1989); Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477 (1999); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988); Richard A. Posner, *Law School Rankings*, 81 IND. L.J. 13 (2006); Richard A. Posner, *Legal Reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights*, 59 U. CHI. L. REV. 433 (1992); Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1 (1993); Richard A. Posner, *Ms. Aristotle*, 70 TEX. L. REV. 1013 (1992); Richard A. Posner, *Pragmatic Adjudication*, 18 CARDOZO L. REV. 1 (1996); Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551 (1998); Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59 (1987); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983).

⁴See generally Richard A. Posner, *Judges' Writing Styles (And Do They Matter?)*, 62 U. CHI. L. REV. 1421 (1995) [hereinafter Posner, *Judges' Writing Styles*]

⁵The U.S. Court of Appeals for the Seventh Circuit (“Seventh Circuit”) has jurisdiction over Illinois, Indiana and Wisconsin. See U.S. Courts, <http://www.uscourts.gov/courtlinks/> (last visited Nov. 17, 2008).

⁶*Benslimane v. Gonzales*, 430 F.3d 828, 829 (7th Cir. 2005). By comparison, during the same

during the same year, the Seventh Circuit granted two-thirds of the petitions for review filed by aliens seeking asylum.⁷ Consequently, the third reason for studying the Seventh Circuit's use of rhetoric in the immigration context is that it provides a terrific database of decisions.

Yet these three preliminary reasons are easily overshadowed by a far more compelling concern. In recent years, significant attention has been paid to the problems plaguing our immigration courts. While administrative efforts at reform are ongoing, judicial frustration with the immigration courts is palpable.⁸ The judiciary has limited ability to address the inherent problems plaguing these administrative courts.⁹ Rhetoric, however, presents an opportunity that has yet to be fully explored. Used properly, rhetoric is a tool the judiciary can wield not simply to effectively draft opinions in isolated cases, but also to bring drastically needed reform.

I. THE STATE OF U.S. IMMIGRATION COURTS

Before discussing how rhetoric can be a powerful tool of immigration reform, it is necessary to outline in some detail both the problems facing our immigration courts and the various meanings of rhetoric. Turning first to consider the state of our immigration courts, one must initially recognize the critical role they play in U.S. immigration law. Before any person within the United States may be physically removed by the Department of Homeland Security, such person has the right to a "removal hearing."¹⁰ It is through this hearing that an alien is provided the right to challenge the grounds for her removal and assert any claims she may have for relief from removal.¹¹

period the Seventh Circuit reversed 18% of the civil cases in which the United States was the appellee. *Id.* For further discussion of efforts to gather data on reversal rates nationally and the Department of Justice's (DOJ) dispute with Posner's statistics, see Sydenham B. Alexander III, *A Political Response to Crisis in the Immigration Courts*, 21 GEO. IMMIGR. L.J. 1, 13-17 (2006).

⁷John R. Floss, *Seeking Asylum in a Hostile System: The Seventh Circuit Reverses to Confront a Broken Process*, 1 SEVENTH CIR. REV. 216, 217-18 (2006), available at <http://www.Kentlaw.edu/7cr/v1-1/floss.pdf>. The five-month period studied was between June 15, 2005 and December 15, 2005. *Id.*

⁸As the *Benslimane* court noted,

[T]he adjudication of these [immigration] cases at the administrative level has fallen below the minimum standards of legal justice . . . [T]he power of correction lies in the Department of Homeland Security, which prosecutes removal cases, and the Department of Justice, which adjudicates them in its Immigration Court and Board of Immigration Appeals.

Benslimane, 430 F.3d at 830.

⁹THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 1149-90 (6th ed. 2008).

¹⁰See Immigration and Naturalization Act § 240, 8 U.S.C. § 1229a (2006).

¹¹STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 639-41 (4th ed. 2005).

Removal hearings begin before an immigration judge (IJ) within the immigration court that has jurisdiction over the alien's residence.¹² These hearings are an administrative matter.¹³ United States immigration courts are a division within the Executive Office of Immigration Review (EOIR) of the Department of Justice.¹⁴ When an IJ makes a decision, it may be directly appealed to the Board of Immigration Appeals (BIA), another administrative division of the EOIR.¹⁵ Consequently, both the IJs and the BIA members are accountable to the U.S. Attorney General.¹⁶ The Department of Homeland Security (DHS) prosecutes the alien's removal and is ultimately responsible for the physical deportation of any alien who is ordered removed.¹⁷ If either the alien or DHS disagrees with the final administrative decision, judicial review typically begins in the U.S. Court of Appeals for the circuit in which the immigration court hearing was held.¹⁸

Despite the key role played by our federally administered immigration courts, their failings are pervasive and profound. The problems can broadly be divided into two sorts: incompetence and problems of intemperance.¹⁹

A. Incompetence

Quite simply, IJs in many instances do not understand the law.²⁰ Extreme examples of such incompetence are not hard to find.²¹ In the Ninth Circuit, an

¹²There are approximately fifty-five immigration courts. For a complete listing, see U.S. Dep't of Justice, Executive Office for Immigration Review, <http://www.usdoj.gov/eoir/sibpages/ICadr.htm#IL> (last visited Nov. 17, 2008).

¹³LEGOMSKY, *supra* note 11, at 639-41.

¹⁴*Id.* at 639.

¹⁵*Id.* at 641-42.

¹⁶*Id.*

¹⁷*Id.* at 635-39. For an overview of the administrative removal process, see *id.* at 633-42.

¹⁸As Legomsky succinctly states, judicial review of removal orders is a "technical minefield." *Id.* at 642. For a densely detailed overview of the limits imposed on judicial review of immigration matters, see *id.* at 642-43, 727-61.

¹⁹For my more detailed discussion of the incompetence and intemperance of the immigration courts and the BIA, see Linda Kelly Hill, *Holding the Due Process Line for Asylum*, 36 HOFSTRA L. REV. 85, 100-109 (2007).

²⁰*Id.* at 103.

²¹*See, e.g.,* Cao He Lin v. U.S. Dep't of Justice, 428 F.3d 391, 406 (2d Cir. 2005) ("[T]he IJ [Immigration Judge] relied on speculation, failed to consider all of the significant evidence, and appeared to place undue reliance on the fact that [respondent's] documents were not authenticated. . . ."); Chen v. U.S. Dep't of Justice, 426 F.3d 104, 115 (2d Cir. 2005) (the IJ's finding was "grounded solely on speculation and conjecture"); Korytnyuk v. Ashcroft, 396 F.3d 272, 292 (3d Cir. 2005) ("[I]t is the IJ's conclusion, not [the petitioner's] testimony, that 'strains credulity.'"); Elzour v. Ashcroft, 378 F.3d 1143, 1154 (10th Cir. 2004) ("[T]he IJ's reasoning fell short of his obligation to 'provide a foundation for his disbelief of [Petitioner's] testimony on these points.'" (citing Gao v. Ashcroft, 299 F.3d 266, 278 (3d Cir. 2002))); Gao, 299 F.3d at 279 ("At least on the

IJ's opinion is found so devoid of reason that it is described as "literally incomprehensible."²² The Seventh Circuit likewise repeatedly attacks the competence of the local, Chicago-based IJs.²³ An IJ's decision is deemed "hard to take seriously."²⁴ Credibility determinations are repeatedly found baseless;²⁵

record it does not appear that the IJ's conclusions are supported.").

²²*Recinos de Leon v. Gonzales*, 400 F.3d 1185, 1187 (9th Cir. 2005); see also Kelly Hill, *supra* note 19, at 103. For further discussions of the problems besetting immigration courts nationwide, see Alexander, *supra* note 6, at 11-36; Stephen H. Legomsky, *Deportation and the War on Independence*, 91 CORNELL L. REV. 369, 372-79 (2006).

²³The immigration courts of Chicago are the only immigration courts within the Seventh Circuit's jurisdiction of Illinois, Indiana, and Wisconsin. For a listing of the immigration courts nationwide, see U.S. Dep't of Justice, Executive Office for Immigration Review, www.usdoj.gov/eoir/sibpages/ICadr.htm (last visited Nov. 17, 2008). On the jurisdiction of the U.S. Circuit Courts of Appeals, see *supra* note 5.

²⁴*Grupee v. Gonzales*, 400 F.3d 1026, 1028 (7th Cir. 2005). For other examples of poorly reasoned opinions by the Chicago immigration courts, see, e.g., *Banks v. Gonzales*, 453 F.3d 449, 452 (7th Cir. 2006) (finding IJ's treatment of the evidence as "hard to fathom" and reminding the court that the correct legal standard for asylum "must be followed whether or not an alien draws it to the agency's attention"); *Gjerazi v. Gonzales*, 435 F.3d 800, 813 (7th Cir. 2006) ("Like all asylum applicants, [respondent] is entitled to a well-reasoned, documented, and complete analysis that engages the evidence The IJ's decision falls far short of this standard, and we hold that his conclusions are not supported by substantial evidence in the record."); *Dawoud v. Gonzales*, 424 F.3d 608, 610 (7th Cir. 2005) ("The IJ's opinion is riddled with inappropriate and extraneous comments"); *Iao v. Gonzales*, 400 F.3d 530, 533 (7th Cir. 2005) ("The [IJ's] opinion cannot be regarded as reasoned"); *Kourski v. Ashcroft*, 355 F.3d 1038, 1039 (7th Cir. 2004) ("There is a gaping hole in the reasoning of the [BIA] and the [IJ]."). For extensive review of the Seventh Circuit's immigration decisions, see generally Floss, *supra* note 7.

²⁵For examples of irrational credibility determinations by the Chicago-based IJs, see *Hanaj v. Gonzales*, 446 F.3d 694, 700 (7th Cir. 2006) ("An IJ must analyze inconsistencies against the backdrop of the whole record No such examination occurred here") (citation omitted); *Tabaku v. Gonzales*, 425 F.3d 417, 423 (7th Cir. 2005) ("[W]e will not uphold an IJ's speculative alternative if it has no basis in the record."); *Hor v. Gonzales*, 421 F.3d 497, 500 (7th Cir. 2005) (stating that the IJ's credibility assessment was based on "unsubstantiated conjectures"); *Lin v. Ashcroft*, 385 F.3d 748, 755-56 (7th Cir. 2004) ("The IJ's skepticism—utterly unsupported by any facts in the record—with respect to [one] detail of her story does not form a valid basis for a negative credibility determination, in the face of the other corroborating information").

For examples of poorly reasoned credibility determinations in other jurisdictions, see *Cao He Lin*, 428 F.3d at 404 (determining that the "IJ's principal reasons for generally discounting [petitioner's] credibility are seriously flawed"); *Elzour*, 378 F.3d at 1153 (IJ "failed to substantiate his skepticism with any record support"); *Dia v. Ashcroft*, 353 F.3d 228, 250 (3d Cir. 2003) (en banc) (stating that the IJ's "opinion consists not of the normal drawing of intuitive references from a set of facts, but, rather, of a progression of flawed sound bites that gives the impression that she was looking for ways to find fault with [petitioner's] testimony"); *Gao*, 299 F.3d at 279 ("IJ rested his decision on a credibility determination that is not supported by substantial evidence in the record.").

Judge Posner curtly describing one as a product of “factual error, bootless speculation, and errors of logic.”²⁶

The BIA, the administrative appellate unit of our immigration courts, is also roundly criticized for its incompetence. While the Seventh Circuit ridicules the BIA as “not aware of the most basic facts,”²⁷ the Third Circuit charges it as “simply ignor[ing the factual] findings and replac[ing] them with [their] own version.”²⁸

B. Intemperance

As a somewhat related matter, the immigration courts’ incivility is also frequently and widely recognized. Sadly, instances of such intemperance are not hard to find. Intemperance can take the form of extreme nitpicking, with an IJ crossing over the line of impartial adjudicator and fact-finder and effectively becoming an aggressive prosecutor.²⁹ Intemperance is clear when an asylum applicant is “ground to bits” by the relentless questioning of an IJ³⁰ or when an IJ asks more questions and insists upon more detail than the DHS trial attorney who is present and charged with prosecuting the removal.³¹ In many instances, the judge’s courtroom demeanor openly betrays his partiality. One IJ takes the time to tell an asylum applicant: “You have no right to be here. All of the applicants that are applying for asylum have no right to be here.”³² In perhaps my favorite example of intemperance, the Third Circuit describes “[t]he tone, the tenor, the disparagement, and the sarcasm of the IJ [as] more appropriate to a

²⁶*Pramatarov v. Gonzales*, 454 F.3d 764, 765 (7th Cir. 2006).

²⁷*Ssali v. Gonzales*, 424 F.3d 556, 563 (7th Cir. 2005). For additional Seventh Circuit criticism of the BIA, see *Sepulveda v. Gonzales*, 464 F.3d 770, 772 (7th Cir. 2006) (“In the cases we’ve cited—as in this case—the Board ha[s] failed to explain how its rejection of the claimed social group squared with the test the Board had adopted in [*In re Acosta*, 19 I & N. Dec. 211 (BIA 1995)].”) For the recent Department of Justice efforts to improve the BIA, see *infra* notes 36-38 and accompanying text.

²⁸*Forteau v. U.S. Att’y Gen.*, 240 F. App’x 531, 534 (3d Cir. 2007). For the recent Department of Justice efforts to improve the BIA, see *infra* notes 36-38 and accompanying text.

²⁹For further discussion of the IJ’s unique role, see Kelly Hill, *supra* note 19, nn.57-62 and accompanying text.

³⁰*Cham v. U.S. Att’y Gen.*, 445 F.3d 683, 691 (3d Cir. 2006). For further discussion of such intemperate behavior, see Margaret Graham Tebo, *Asylum Ordeals: Some Immigrants Are ‘Ground to Bits’ in a System that Leaves Immigration Judges Impatient, Appellate Courts Irritated and Lawyers Frustrated*, A.B.A. J., Nov. 2006, at 36.

³¹In *Giday v. Gonzales*, the IJ asks seventy-three questions, the petitioner’s attorney asks eighty-seven, while the DHS prosecuting attorney asks only four. 434 F.3d 543, 548 (7th Cir. 2006). In remanding the IJ’s negative credibility finding, the Seventh Circuit urged: “[T]he volume of case law addressing the issue of the intemperate, impatient, and abrasive [IJs] should sound a warning bell to the Department of Justice that something is amiss.” *Id.* at 549-50.

³²*Sukwanputra v. Gonzales*, 434 F.3d 627, 638 (3d Cir. 2006).

court television show than a federal court proceeding.”³³

C. System Failure

Unfortunately, these examples of incompetence and intemperance are neither isolated nor trivial. As mentioned earlier, the Seventh Circuit’s high rates of reversal in immigration cases reflect serious problems.³⁴ As Judge Posner remarks in the opening lines of one reversal: “At the risk of sounding like a broken record, we reiterate our oft-expressed concern[s] The performance of [our] federal [immigration] agencies is too often inadequate. This case presents another depressing example.”³⁵

The circuits are not alone in recognizing the incompetence and intemperance of our immigration courts. The problems are so systemic that in January 2006, then Attorney General Alberto Gonzales readily admitted to what he described as the “intemperate” and “abusive” conduct of our federal IJs.³⁶ In making this announcement, Gonzales initiated a national review of U.S. immigration courts.³⁷ Since the completion of such review, numerous administrative measures have been introduced to improve the quality and training of U.S. IJs.³⁸

³³Wang v. U.S. Att’y Gen., 423 F.3d 260, 269 (3d Cir. 2005).

³⁴See *supra* notes 6-7 and accompanying text.

³⁵Pasha v. Gonzales, 433 F.3d 530, 531 (7th Cir. 2005).

³⁶In relevant part, Attorney General Gonzales said:

I have watched with concern the reports of [IJs] who fail to treat aliens appearing before them with appropriate respect and consideration and who fail to produce the quality of work that I expect from employees of the Department of Justice. While I remain convinced that most [IJs] ably and professionally discharge their difficult duties, I believe there are some whose conduct can aptly be described as intemperate or even abusive and whose work must improve.

To better assess the scope and nature of the problem, I have asked the Deputy Attorney General and the Associate Attorney General to develop a comprehensive review of the immigration courts

In the meantime, I urge you always to bear in mind the significance of your cases and the lives they affect. To the aliens who stand before you, you are the face of American justice. Not all will be entitled to the relief they seek. But I insist that each be treated with courtesy and respect. Anything less would demean the office that you hold and the Department in which you serve.

Memorandum from U.S. Att’y Gen. Alberto Gonzales to Immigration Judges (Jan. 9, 2006), available at <http://www.immigration.com/newsletter1/attgenimmjudge.pdf> [hereinafter Gonzales Memorandum]. For significant quotation of such memorandum, see *Cham v. Attorney General*, 445 F.3d 683, 686 (3d Cir. 2006).

³⁷Gonzales Memorandum, *supra* note 36 (“I have asked the Deputy Attorney General and the Associate Attorney General to develop a comprehensive review of the immigration courts.”).

³⁸When the review was completed in August, 2006, the details and findings were not publicly disclosed. However, at that time Attorney General Gonzales announced twenty-two measures aimed at reforming the immigration courts and the BIA. Press Release, U.S. Dep’t of Justice, Att’y

Given such developments, an optimist might suggest that efforts at reform are still in their infancy and more time should be afforded to see what administrative improvements take hold. However, the overall broken nature of our federal immigration system, in combination with the institutional problems besetting the Department of Justice, necessitate that reform be initiated in other forums.³⁹ It is this desire that leads to advocating the judicial use of rhetoric and appreciating its various meanings.

II. RHETORIC DEFINED

An understanding of rhetoric in its truest, most complete definition is broader than simply casting about inflammatory terms like “amnesty” or “the rule of law.” In his book *Classical Rhetoric for Modern Discourse*, John Mackin breaks rhetoric into three forms: truth-seeking, persuasion, and speaking well.⁴⁰

Gen. Alberto R. Gonzales Outlines Reforms for Immigration Courts and Board of Immigration Appeals (Aug. 9, 2006), *available at* http://www.usdoj.gov/opa/pr/2006/August/06_ag_520.html. Such initial directives included performance evaluations for sitting judges, competence exams for newly appointed judges, a standard disciplinary system, personnel increases, and other technological and support system improvements. *Id.* For further discussion of the initial review and reform efforts, see Kelly Hill, *supra* note 19, at 86-89.

In March 2008, Chief Immigration Judge David A. Neal announced the issuance of a nationwide practice manual for parties appearing before the immigration courts. Cover Letter for the Immigration Court Practice Manual, David L. Neal, Chief Immigration Judge, U.S. Dep’t of Justice, Executive Office for Immigration Review, Office of the Chief Immigration Judge, The Immigration Court Practice Manual (Mar. 2008), *available at* <http://www.usdoj.gov/eoir/vll/OCIJPracManual/cover%20letter%20rev.pdf>. The manual is recognized to be in response to the Attorney General’s 2006 directive which “arose out of the public’s desire for greater uniformity in Immigration Court procedures and a call for the Immigration Courts to implement their ‘best practices’ nationwide.” *Id.*

In May 2008, Attorney General Michael Mukasey announced the appointment of five new members to the BIA. Press Release, U.S. Dep’t of Justice, Attorney General Mukasey Appoints Five New Members to the Board of Immigration Appeals (May 30, 2008), *available at* <http://www.usdoj.gov/opa/pr/2008/May/08-ag-483.html>. Such announcement, in combination with some earlier hirings, restores the BIA to the number of members it had prior to the massive “streamlining” measures begun by former Attorney General John Ashcroft in 2002. For an extensive discussion and criticism of the BIA firings and earlier re-hirings, see Kelly Hill, *supra* note 19, at 110 n.103.

³⁹For a discussion of the 2007 congressional investigation of the Department of Justice, Alberto Gonzales’s resignation as Attorney General, and the politically-charged practices of the Department of Justice during the Bush administration, see Kelly Hill, *supra* note 19, at 86-91.

⁴⁰JOHN H. MACKIN, CLASSICAL RHETORIC FOR MODERN DISCOURSE: AN ART OF INVENTION, ARRANGEMENT, AND STYLE FOR READERS, SPEAKERS, AND WRITERS 6-7 (1969).

A. Truth-Seeking

Rhetoric as truth-seeking is rhetoric in its purest form. Envisioned by Socrates, rhetoric is “the art of influencing the soul through words.”⁴¹ For Socrates, “the soul” is limited to one’s ability to reason.⁴² Consequently, to the extent law professors use the “Socratic” method in their classrooms, the goal is to appeal to students’ reasoning abilities and thereby reach the truth. In this Socratic way, the teacher and students engage in a discourse, searching for truth together as part of a common effort.⁴³ In reaching the truth, the Socratic rhetorician and his audience are ultimately swept away by the depth of their conviction and are physically moved to action.⁴⁴

However, even within a law school’s confines, Socrates’ truth-seeking dictates do not constrain rhetoric’s use. As Frederic Gale proudly admits, many professors believe they have the “responsibility to teach not only how to think but even what to think about.”⁴⁵ What we see in this alternative view of law school teaching is that unlike Socrates’ effort to use rhetoric in a search for truth, rhetoric may be seen as a legitimate tool of persuasion. Rhetoric as persuasion brings us to a second, classical definition of “rhetoric.”

B. Persuasion

Unlike Socrates, Aristotle endorses rhetoric’s persuasive powers.⁴⁶ For Aristotle, rhetoric is to be used in a search for meaning, not truth. Rhetoric thereby becomes “an invaluable constituent of argumentation in circumstances in which the meaning rather than the truth of an event [is] at issue.”⁴⁷ Following this course, the appeal is not simply to one’s rationale but also to one’s morals and emotions.⁴⁸ In short, it is persuasion by *any* “available means.”⁴⁹

Judge Posner also views the judicial use of rhetoric from this perspective. Liking judges to poets, Judge Posner recognizes that the poet-judge may legitimately appeal to emotion. Paraphrasing the work of Robert Penn Warren on poetry, Judge Posner declares that for the poet-judge, “nothing that is available in human experience is to be legislated out of [law].”⁵⁰

⁴¹*Id.* at 6. Socrates’ definition is reported by Plato in *Phaedrus*.

⁴²*Id.*

⁴³*Id.* at 42-44 (discussing the Socratic dialectic and its purpose to enlighten all involved).

⁴⁴*Id.* at 44.

⁴⁵FREDRIC G. GALE, *POLITICAL LITERACY: RHETORIC, IDEOLOGY, AND THE POSSIBILITY OF JUSTICE* 163 (1994).

⁴⁶MACKIN, *supra* note 40, at 6 (“Aristotle . . . defined rhetoric as a faculty of observing in any given case the available means of persuasion.”). Aristotle defines rhetoric in his work, *Rhetoric*.

⁴⁷Lawrence Douglas, *Constitutional Discourse and Its Discontents: An Essay on the Rhetoric of Judicial Review*, in *THE RHETORIC OF LAW* 225, 226 (Austin Sarat & Thomas R. Kearns eds., 1994).

⁴⁸MACKIN, *supra* note 40, at 6.

⁴⁹*Id.*

⁵⁰Posner, *Judges’ Writing Styles*, *supra* note 4, at 1448 (substituting the word “law” for

Joining Posner in imagining the poet-judge, Martha Nussbaum argues that the appeal to an audience's emotions naturally allows the poet-judge to recognize her own emotional responses.⁵¹ Yet as Nussbaum cautions, the poet-judge nevertheless remains a "judicious spectator."⁵² The poet-judge engages in "detached evaluation" but still displays empathy for the disadvantaged and a full understanding of history.⁵³ Likening the poet-judge to the reader of a novel, the poet-judge maintains a type of "[l]iterary neutrality, . . . like the reading of a novel, gets close to the people and their actual experience. That is how it is able to be fair."⁵⁴

Within the rubric of rhetoric as persuasion and an appeal to emotions, one should take care to make a critical distinction between positive persuasion—which Lawrence Douglas characterizes as a "forceful and meaningful" use of words—and the more "crass" art of manipulation.⁵⁵ When rhetoric manipulates, it devolves. It is no longer a pure appeal to rationality nor a legitimate appeal to the emotions. Instead, as Plato describes, when rhetoric manipulates, it degenerates into "a knack of convincing the ignorant that [the speaker] knows more than the experts."⁵⁶

C. *Speaking Well*

Finally, distinguishing rhetoric's use to seek truth, to persuade, or even to manipulate is the recognition of rhetoric simply as the "science of speaking well."⁵⁷ Quintilian, a lawyer and professor of rhetoric in imperial Rome, is often associated with appreciating this more aesthetic aspect of rhetoric.⁵⁸ Judge Posner shares such an appreciation of the art. Borrowing again from Robert Penn Warren's thoughts on poetry, Judge Posner distinguishes between "pure" and "impure" judicial writing styles.⁵⁹

1. *"Pure" Writing.*—Whereas in poetry, "pure" writing is equated with Tennyson and the nineteenth-century Victorian style, "pure" judicial writing is

"poetry" but otherwise quoting Robert Penn Warren, *Pure and Impure Poetry*, in ROBERT PENN WARREN, *SELECTED ESSAYS* 3 (Random House 1958)).

⁵¹Martha C. Nussbaum, *Poets as Judges: Judicial Rhetoric and the Literary Imagination*, 62 U. CHI. L. REV. 1477, 1481-82 (1995).

⁵²*Id.* at 1486.

⁵³*Id.*

⁵⁴*Id.*

⁵⁵Douglas, *supra* note 47, at 226.

⁵⁶*Id.* at 225 (quoting PLATO, *GORGAS* 38 (Walter Hamilton trans., 1960)).

⁵⁷MACKIN, *supra* note 40, at 6-7; *see also* MICHAEL H. FROST, *INTRODUCTION TO CLASSICAL LEGAL RHETORIC: A LOST HERITAGE* 69 (2005) (discussing Quintilian's approach to rhetoric).

⁵⁸*See* FROST, *supra* note 57, at 86 (discussing 3 QUINTILIAN, *INSTITUTIO ORATORIA* 185 (H.E. Butler trans., 1954)); *see also* MACKIN, *supra* note 40, at 6-7.

⁵⁹Posner, *Judges' Writing Styles*, *supra* note 4, at 1426-32 (relying on WARREN, *supra* note 50).

equated with the overuse of form.⁶⁰ For Posner, the “pure” poet-judge’s writing is too “solemn [and] highly polished.”⁶¹ The “pure” poet-judge fails because he is “far removed from the tone of conversation—impersonal.”⁶² Posner cites Justice Blackmun’s writings as exemplifying the “pure” judicial writing style.⁶³ Blackmun is the “arch-sentimentalist, . . . arch-egoist.”⁶⁴ Deriding important Blackmun decisions, Posner characterizes *Deshaney v. Winnebago County Department of Social Security*⁶⁵ as “maudlin,”⁶⁶ *Planned Parenthood of South Eastern Pennsylvania v. Casey*⁶⁷ as “narcissistic”⁶⁸ and *Roe v. Wade*⁶⁹ as “unreasoned [and] sophomoric.”⁷⁰

2. “Impure” Writing.—By contrast, the “impure” judicial writers are equated with such “impure” but respected poets as Shakespeare.⁷¹ The “impure” are committed to creating a dialogue with life.⁷² They write not simply for the “legal insiders” but for all laypeople, in an effort to truly communicate.⁷³ Judge Posner celebrates such pragmatists as Justice Holmes and Justice Black as models of the “impure” judicial writing style.⁷⁴ Posner’s suggestion seems to be that it is impure, rather than pure writing that should be advanced.⁷⁵

Recognizing each valid use of rhetoric, a lawyer must speak truth, persuade, and do so with style. Or, as Quintilian pleads, a lawyer must “instruct, move, and

⁶⁰*Id.* at 1428-29.

⁶¹*Id.* at 1429.

⁶²*Id.*

⁶³*Id.* at 1433-35.

⁶⁴*Id.* at 1433.

⁶⁵489 U.S. 189 (1989).

⁶⁶Posner, *Judges’ Writing Styles*, *supra* note 4, at 1433-34 (finding Blackmun’s “Poor Joshua!” comment to imply that Joshua’s irreversible brain damage inflicted by his father might have been reversible. *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting)).

⁶⁷505 U.S. 833 (1992).

⁶⁸Posner, *Judges’ Writing Styles*, *supra* note 4, at 1434 & n.28 (noting Blackmun’s self-aggrandizement in the abortion debate in *Casey*, 505 U.S. at 923, 943 (Blackmun, J., concurring in part and dissenting in part)).

⁶⁹410 U.S. 113 (1973).

⁷⁰Posner, *Judges’ Writing Styles*, *supra* note 4, at 1434-35 & nn.26, 29 (pointing to Blackmun’s lengthy history of abortion in *Roe*, 410 U.S. at 130-47 and pointing to Judge Posner’s more lengthy discussion of the “rhetorical ineptitude of the opinion” in RICHARD A. POSNER, *SEX AND REASON* 237 (1992)).

⁷¹*Id.* at 1428.

⁷²*Id.* at 1428 n.13. Posner quotes Samuel Johnson as remarking that Shakespeare’s “dialogue is level with life.” *Id.* (quoting Samuel Johnson, *Preface to the Plays of William Shakespeare*, in SAMUEL JOHNSON’S LITERARY CRITICISM 139, 143 (R.D. Stock ed., 1974)).

⁷³*Id.* at 1431.

⁷⁴*Id.* at 1432.

⁷⁵*Id.* at 1431 (noting that “the impure judicial stylist may have a larger audience than the pure”).

charm his hearers.’’⁷⁶

III. RHETORIC APPLIED: *KADIA V. GONZALES*

A. Case History

In this quest, let us turn to the Seventh Circuit’s use of rhetoric in the immigration context. While the Seventh Circuit is unusually prolific in the immigration area,⁷⁷ the query now becomes not only whether the Circuit’s rhetoric “moves, instructs and charms” the reader in any particular case but also whether its use may have a more powerful impact upon our immigration courts as a whole.

In September, 2007, Judge Posner issued the sole opinion in *Kadia v. Gonzales*.⁷⁸ Mr. Henry Kadia came to the United States seeking asylum from his native country of Cameroon.⁷⁹ In Cameroon, Kadia had been politically active, supporting a secessionist movement in southern Cameroon and political parties which advocated the south’s secession by peaceful means.⁸⁰ Appearing pro se, Kadia testified that he had been arrested, detained, “often beaten,” and tortured in Cameroon.⁸¹ In his written affidavit, and ultimately in his testimony, he further explained that this torture included having hot rubber poured down his back.⁸²

While Cameroon may seem far away and remote to those who are in Indianapolis, even this law school is connected. Several students in the LL.M. program are from Cameroon. At least one of these Cameroonian students was awarded political asylum due to persecution for similarly supporting the secessionist movement of southern Cameroon. Yet at Mr. Kadia’s immigration hearing in Chicago, IJ Robert D. Vinikoor denied asylum, finding that his story of persecution was not credible.⁸³ Affirming the IJ’s findings, the BIA upheld the

⁷⁶FROST, *supra* note 57, at 58 (quoting 1 QUINTILIAN, *supra* note 58, at 397).

⁷⁷See *supra* notes 6-7 and accompanying text.

⁷⁸501 F.3d 817 (7th Cir. 2007). While *Kadia* was argued before a three judge panel of the Seventh Circuit, Judge Ripple recused himself after oral argument, leaving only Judges Posner and Wood to decide the case. *Id.* at 819 n.*. Admittedly, it is impossible to confidently attribute any written opinion solely to the acknowledged author when it is supported by other panel members. However, given that only two judges participated in the deliberations of *Kadia*, Posner’s “true” authorship bears greater certainty.

Struggling with the attribution difficulty in his examination of Justice Antonin Scalia’s use of rhetoric, Michael Frost limits his examination to Scalia’s dissenting opinions as they are less likely to be collaborative efforts. FROST, *supra* note 57, at 120-22.

⁷⁹*Kadia*, 501 F.3d at 819.

⁸⁰*Id.*

⁸¹*Id.*

⁸²*Id.* at 822.

⁸³*Id.* at 819. While *Kadia* does not disclose the identity of the IJ, I was initially introduced to the *Kadia* decision by Judge Vinikoor who identified himself as the deciding IJ.

IJ's negative credibility determination.⁸⁴

Issuing the Seventh Circuit opinion, Judge Posner remarks at the outset that had Mr. Kadia been found credible, his account of persecution would have established a well-founded fear of persecution on account of his political opinion.⁸⁵ Judge Posner also immediately acknowledges the terrific deference that must be given to the fact-finder, particularly on matters of credibility.⁸⁶ Despite such deference, Judge Posner effectively employs numerous rhetorical tools to persuade the reader of Kadia's credibility and, conversely, the IJ's incompetence and intemperance.

B. Emotional Persuasion

Strategically, Posner begins his opinion with an emotional appeal that lets the reader identify with both underdogs in the case: the asylum applicant and the IJ. Posner immediately extends sympathy toward the IJ. He recognizes the immigration courts' tremendous workload, sees the "avalanche of asylum claims" under which they toil, and understands they are "grossly understaffed."⁸⁷ Such sympathy for the immigration courts is a common theme of the Seventh Circuit. In an earlier opinion, Judge Easterbrook, describes Chicago's IJs as "overworked . . . Midwest" lawyers.⁸⁸ Nevertheless, Seventh Circuit sympathy does not yield forgiveness.

C. Exaggerated Style

Indeed, in *Kadia*, any sympathy one initially feels for the IJ is quickly extinguished as Posner reminds readers that nationwide the circuits' rate of reversing negative credibility determinations in asylum matters is extraordinarily high.⁸⁹ "Deference is earned; it is not a birthright."⁹⁰ "[E]gregious failures" may be understood "but not excused."⁹¹ Such admonishments set the tone and foretell the outcome. As readers we are now prepared to hear numerous mistakes and are conditioned to view them as egregious. We are set up.

⁸⁴*Id.*

⁸⁵*Id.*

⁸⁶*Id.* at 819-20. In reviewing credibility determinations based on inconsistencies or falsehoods in testimony, Posner framed the standard "as whether the determination of credibility was reasonable, not whether it was correct." *Id.* at 820.

⁸⁷*Id.*

⁸⁸*Banks v. Gonzales*, 453 F.3d 449, 454 (7th Cir. 2006). In referring to these administrative, IJs as "lawyers," perhaps a slight was also intended.

⁸⁹*Kadia*, 501 F.3d at 820. In the first two months of 2006, two-thirds of reversals in asylum matters involved credibility determinations. *Id.* (relying on Edward R. Grant, *Laws of Intended Consequences: IIRIRA and Other Unsung Contributors to the Current State of Immigration Litigation*, 55 CATH. U. L. REV. 923, 959 (2006)). For the Seventh Circuit's own reported reversal rates, see *supra* notes 6-7 and accompanying text.

⁹⁰*Kadia*, 501 F.3d at 821.

⁹¹*Id.*

One such egregious mistake lays in Posner's charge that the IJ employs "the discredited doctrine of *falsus in uno, falsas in omnibus* (false in one thing, false in all things)."⁹² Posner now turns the sympathy toward Kadia, bringing one to understand why any petitioner might exaggerate or stretch the truth. He gets readers to believe that it is the judge's job, not the witness', to overcome this problem. Specifically Posner says: "Anyone who has ever tried a case or presided as a judge at a trial knows that witnesses are prone to fudge, to fumble, to misspeak, to misstate, to exaggerate. If any such pratfall warranted disbelieving a witness's entire testimony, few trials would get all the way to judgment."⁹³ Note what has happened here: while we can understand the mistakes of IJs and the mistakes of witnesses, it is only the mistakes of witnesses which the law may excuse.

Posner then systematically reviews IJ Vinikoor's negative credibility determination, isolating and discrediting the discrete incredibility findings which relate to various bits of Kadia's story.⁹⁴ Having completed this task, Posner concludes by discrediting the IJ's overall finding of lack of credibility. Posner's tactic can itself be criticized as a variation on the discredited maxim of "false in one thing, false in all things." As some courts have observed, Posner's systematic approach is its own type of "nitpicking" in which the various inconsistencies become seemingly unconnected and can then be characterized as "minor" or "incidental."⁹⁵

Unlike his rapid dismissal of numerous aspects of the IJ's incredibility finding, Posner takes particular care to review the IJ's findings surrounding Mr. Kadia's use of the word "die-hard."⁹⁶ To help establish his political activity, Mr. Kadia had supplied a third party's affidavit in which he is described as a "die-heart supporter" of his political party.⁹⁷ It is this arguable misspelling of die-heart, as opposed to the common American spelling, die-hard, which becomes so critical. The IJ points to Kadia's own affidavit.⁹⁸ Kadia also used the word "diehard" and similarly spelled it as "dieheart."⁹⁹ As a result of the identical believed misspelling of diehard, the IJ suggests the petitioner may have forged

⁹²*Id.*

⁹³*Id.*

⁹⁴Posner deems some of the factual basis for the IJ's incredibility determination to be "trivial" and finds that other "inconsistencies" were not inconsistencies at all." *Id.* at 822.

⁹⁵*Kumar v. Gonzales*, 444 F.3d 1043, 1056, 1060-61 (9th Cir. 2006) (Kozinski, J., dissenting). Similar judicial opposition to such micro-management may have contributed to Congress' success in amending the relevant statutory credibility standard through the Real ID Act of 2005, 8 U.S.C. § 1778 (2006). Pursuant to the Real ID Act, IJs arguably may now make adverse credibility determinations without regard to whether the inconsistencies "[go] to the heart of the . . . claim." *Kumar*, 444 F.3d at 1056 (Kosinski, J., dissenting); see also *Kadia*, 501 F.3d at 822. For further discussion of the Real ID Act and judicial reactions, see Kelly Hill, *supra* note 19, at 113-18.

⁹⁶*Kadia*, 501 F.3d at 823.

⁹⁷*Id.*

⁹⁸*Id.*

⁹⁹*Id.*

the third party supporting affidavit.¹⁰⁰

Certainly, the forgery of an affidavit is no minor inconsistency. To salvage Kadia's credibility, Posner must spend significant time discrediting the IJ's assessment.¹⁰¹ Posner then relies on his own stylistic use of exaggeration: "[t]he [IJ] seems not to have realized—what is obvious even to a generalist judge—that conventions regarding spelling and vocabulary differ among the world's English-speaking populations."¹⁰² In short order, Posner implies that as a specialist, the IJ should have been more familiar with such cultural differences. To further his point, Posner proceeds to act as his own expert. He ventures onto his own internet research expedition and reports back that "diehard" is often spelled "dieheart" in Cameroonian English (as well as English spoken in Jamaica and Pakistan).¹⁰³ Ironically, in resuscitating Kadia, Posner damages his own image. After all, assuming the "role of country specialist" is a routine criticism the Seventh Circuit levies against IJs who engage in comparable research efforts.¹⁰⁴

D. Charm and Connection

Posner's opinion ends with the stylistic flourish he uses so well to charm his audiences. Just when we are getting tired of reading a laundry list of dry, unrelated mistakes and are starting to feel somewhat detached from the petitioner, Posner interjects: "Remember the burning rubber?"¹⁰⁵ And at once we are connected to Kadia again, imagining that hot rubber burning down our own backs. Posner then transports us into the courtroom, providing a portion of the IJ's questions and the petitioner's answers to reflect how difficult it is to testify, particularly when one is unrepresented:

[Q. (IJ):] "[D]id they just punch your [sic] or kick you or what happened?"

¹⁰⁰*Id.*

¹⁰¹*Id.*

¹⁰²*Id.*

¹⁰³*Id.*

¹⁰⁴*Banks v. Gonzales*, 453 F.3d 449, 454 (7th Cir. 2006) (stating that as "an overworked lawyer who spends his life in the Midwest," an IJ cannot "play the role of country specialist"); *see also* *Shtaro v. Gonzales*, 435 F.3d 711, 715 (7th Cir. 2006); *Kllokoqi v. Gonzales*, 439 F.3d 336, 344 (7th Cir. 2005); *Huang v. Gonzales*, 403 F.3d 945, 949-51 (7th Cir. 2005); *Uwase v. Ashcroft*, 349 F.3d 1039, 1042 (7th Cir. 2003). In making these remarks in *Banks*, Judge Posner begins by noting:

An IJ is not an expert on conditions in any given country, and *a priori* views about how authoritarian regimes conduct themselves are no substitute for evidence—a point that we have made repeatedly, but which has yet to sink in. *See, e.g., Kllokoqi v. Gonzales*, 439 F.3d 336, 344 (7th Cir. 2005); *Shtaro v. Gonzales*, 435 F.3d 711, 715 (7th Cir. 2006); *Huang v. Gonzales*, 403 F.3d 945, 949-51 (7th Cir. 2005); *Uwase v. Ashcroft*, 349 F.3d 1039, 1042 (7th Cir. 2003).

Banks, 453 U.S. at 453-454

¹⁰⁵*Kadia*, 501 F.3d at 823.

[A. (Petitioner):] “They used to take you like this and put your foot on door.”

[Q. (IJ):] “They hit your feet?”

[A. (Petitioner):] “Hit your feet, yes.”

[Q. (IJ):] “And then, they put you back in the regular warehouse.”

[A. (Petitioner):] “In the warehouse, yes.”¹⁰⁶

Later in the hearing, the IJ returned to the detention:

[Q. (IJ):] “You didn’t mention that [the melted rubber]. Was that some other incident or is that this incident?”

[A. (Petitioner):] “Well, that’s the incident, Your Honor.”

[Q. (IJ):] “But you didn’t tell me that when you said that. I asked you what harm you suffered. You didn’t tell me anything.”¹⁰⁷

“[G]otcha!” Posner concludes.¹⁰⁸ With this one word and his characteristic dry wit, Posner convincingly critiques the IJ for drawing a negative inference from this limited line of questioning. It is not Kadia but the IJ who is at fault, for denying the unrepresented petitioner an opportunity to describe being subjected to the burning rubber.¹⁰⁹

Posner emotionally connects the reader with the asylee. He brings us into the courtroom, letting us feel the hot rubber as well as the fatigue and confusion that Kadia, an unrepresented individual in a foreign court, must feel. We are convinced. It is the IJ, not the petitioner, who lacks credibility.

IV. FINAL OBSERVATIONS

A. *Judicial Options*

Apart from the victory enjoyed by individual appellants such as Mr. Kadia, what value lies in such a rhetorical discrediting of an IJ? As noted at the outset, the circuits’ ability to correct the deficiencies of our immigration courts is limited.¹¹⁰ Such frustration is exacerbated by the systemic nature of the problem. Reversing yet another negative asylum decision, Posner wearily begins: “At the risk of sounding like a broken record, we reiterate our oft-expressed concern with the adjudication of asylum claims by the Immigration Court and the Board of Immigration Appeals The performance of these federal agencies is too often inadequate. This case presents another depressing example.”¹¹¹

In an earlier article, I argue that the circuits may be able to reform our immigration agencies through such means as directly addressing all due process violations and openly pressuring the Attorney General to rely more heavily on his

¹⁰⁶*Id.*

¹⁰⁷*Id.* at 824.

¹⁰⁸*Id.*

¹⁰⁹*Id.*

¹¹⁰*See supra* notes 8-9 and accompanying text.

¹¹¹*Pasha v. Gonzales*, 433 F.3d 530, 531 (7th Cir. 2005) (citation omitted).

sanctioning capabilities.¹¹² In extreme cases, the Seventh Circuit already follows such prescriptions.¹¹³

Mr. and Mrs. Floroiu fled their native Romania on account of religious persecution.¹¹⁴ As Seventh-Day Adventists, Mr. Floroiu's efforts to spread his faith in Romania were met with anger and threats of death from townspeople and clergy within the Romanian Orthodox church.¹¹⁵ Denying their claims for withholding of removal and other relief, Chicago-based IJ Craig M. Zerbe justified his decision by finding that the respondents were "essentially zealots [who were] contributorily negligent" for their "aggressive proselytizing."¹¹⁶ Affirming IJ Zerbe's decision, the BIA characterized his intemperate comments as nothing more than harmless error.¹¹⁷

In stark contrast, the Seventh Circuit determined IJ Zerbe's lack of impartiality to be so extreme as to violate due process and to necessitate review by the Attorney General for possible disciplinary action.¹¹⁸ In a subsequent action, the Seventh Circuit also took the further, unusual step of awarding attorneys fees and costs against the Department of Justice for defending Zerbe's decision.¹¹⁹ IJ Zerbe's negative treatment of Mr. and Mrs. Floroiu was

¹¹²Kelly Hill, *supra* note 19, at 118-23.

¹¹³I should hasten to add that these Seventh Circuit "reform" efforts began well before the publication of my article, Kelly Hill, *supra* note 19, which advocates such actions.

¹¹⁴*Floroiu v. Gonzales (Floroiu I)*, 481 F.3d 970 (7th Cir.), *costs and att'y fees granted*, 498 F.3d 746 (7th Cir. 2007).

¹¹⁵*Id.* at 971. Citing the Orthodox church's control in Romania, the police offered no protection. *Id.* at 971-72. In fact, the police briefly detained and questioned Mr. Floroiu after he reported the final incident when an Orthodox priest engaged him in a physical altercation and threatened to kill him in front of an angry crowd. *Id.*

¹¹⁶*Id.* at 973 (also denying their claim of asylum because their application was filed after the one-year statutory deadline); *see also* 8 U.S.C. § 1158(a)(2)(B) (2006).

While the Seventh Circuit does not identify IJ Zerbe by name, the decision is attributed to him in an online legal journal. Pamela A. MacLean, *Immigration Judges Behaving Badly Again*, NAT'L L.J., Apr. 6, 2007, *available at* <http://www.nlj.com> (on file with author).

For academic advocacy of "naming" the immigration judge within the body of the judicial opinion, see Alexander, *supra* note 6, at 31-32; Recent Cases, *Immigration Law—Administrative Adjudication—Third and Seventh Circuits Condemn Pattern of Error in Immigration Courts*.—Wang v. Attorney General, 423 F.3d 260 (3d Cir. 2005), and Benslimane v. Gonzales, 430 F.3d 828 (7th Cir. 2005), 119 HARV. L. REV. 2596, 2603 (2006) (student note written by Sydenham Alexander which was later developed into the full article, Alexander, *supra* note 6); *see also* Kelly Hill, *supra* note 19, at 119-20.

As of June 2008, a review of immigration decisions by circuit courts of appeal reflects that only the Second and Third Circuits consistently identify the deciding immigration judge. Alexander reports that the Second Circuit consistent identification of immigration judges began in the summer of 2006. Alexander, *supra* note 6, at 31 n.161.

¹¹⁷*Floroiu I*, 481 F.3d at 973.

¹¹⁸*Id.* at 973, 976.

¹¹⁹*Floroiu v. Gonzales (Floroiu II)*, 498 F.3d 746, 748-50 (7th Cir. 2007) (finding that the

remedied.¹²⁰ Indeed, IJ Zerbe has been overturned numerous times and similarly chastised by the Seventh Circuit.¹²¹ However, at the time of this lecture, IJ Zerbe remains on the bench.¹²²

B. The Power of Rhetoric

And so, with limited judicial alternatives, we return to the potential of rhetoric for immigration reform. Used judiciously, rhetoric is a powerful tool. Judicial opinions become accessible to laypeople and are more likely to be cited by the media. Rhetoric brings the public to empathetically face the challenges our immigration courts pose for an asylum seeker. Beyond simply convincing us of abuses in an isolated case, rhetoric allows us to recognize the breadth and systemic nature of the problem. As the Seventh Circuit urges, “the volume of caselaw” detailing the problems besetting our immigration courts must sound the “warning bell . . . that something is amiss.”¹²³ Laid in the proper judicial hands, rhetoric sounds the bell loud enough that we can all hear it.

government’s opposition to the due process claim not only failed to meet the statutory standard of “substantial justification” but that its was also simply “unreasonable”).

¹²⁰*Florioiu I*, 481 F.3d at 976-77 (reversing IJ Zerbe’s decision and calling for a different IJ upon remand).

¹²¹For further discussion of IJ Zerbe and the negative treatment of his decisions by the Seventh Circuit, see Kelly Hill, *supra* note 19, at 120-21.

¹²²U.S. Dep’t of Justice, Executive Office for Immigration Review, <http://www.usdj.gov/eoir/sibpages/ICadr.htm#IL>.

¹²³*Giday v. Gonzales*, 434 F.3d 543, 549-50 (7th Cir. 2006).

ARTICLES

JUDICIAL ADVOCACY IN PRO SE LITIGATION: A RETURN TO NEUTRALITY

HON. ROBERT BACHARACH*
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In theory the law creates impersonal rules of behavior that courts apply in an identical fashion regardless of the litigant.¹ Ideally, the powerful and powerless can expect to follow the same rules of law and procedure in any courtroom. Through neutral rules of practice and procedure, the courts seek to assure an equal opportunity for a full and fair hearing to all parties. Of course, the world is not perfect and there are obvious variables ranging from the lawyers' abilities, to the financial wherewithal of the parties that might affect the process of litigation. Yet, courts could apply their rules in a similar fashion to all with the hope that such a system will produce a just result.

Somewhere this ideal of neutrality has derailed in favor of an incongruous, ad hoc set of rules applicable only to pro se litigants.² While courts arguably intended some of these rules to benefit the pro se litigant and to ease the disadvantage of proceeding without counsel, in practice, even benign rules have worked to disfavor or even punish the pro se litigant. The result is that ad hoc rules designed to protect pro se litigants are often doing just the opposite. This Article endeavors to (1) trace the set of rules that apply uniquely to pro se litigants, (2) explore how those rules derailed, and (3) suggest a path for restoration of the impersonal ideal that once underlay the legal fabric of American law.

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1. See *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970) (discussing “desirability that the law furnish a clear guide for the conduct of individuals . . . and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments”); see also *La. ex rel. Francis v. Resweber*, 329 U.S. 459, 470 (1947) (Frankfurter, J., concurring) (stating that the problem before the Court “involve[d] the application of standards of fairness and justice broadly conceived . . . [N]ot the application of merely personal standards but the *impersonal standards* of society which alone *judges* as the Organs of Law are empowered to enforce” (emphasis added)).

2. See *infra* Part I.

I. THE DILEMMA

The schism that has developed in the treatment of pro se litigation is the by-product of two conflicting goals used in the evaluation of pro se pleadings. The first objective involves the measures used to assess whether the pleading sufficiently states a claim for relief.³ Part of this objective seeks to assure that mere procedural technicalities do not trip up the unwary litigant.⁴ The second, somewhat incongruous goal, deals with the basic notion that both the represented and unrepresented must follow the same procedural rules.⁵

A. Inconsistencies with the Liberalized Pleading Standard of the Federal Rules of Civil Procedure

The first objective in the evaluation of pleadings is captured in the well-known terms of Federal Rule of Civil Procedure (Rule) 8(a)(2), which provides that a pleading setting out a claim for relief need only contain “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁶ This liberal pleading requirement reflects a long-established policy move away from the technical or stylized pleading forms of earlier common law practice.⁷ Under the Rules, the function of pleading a claim for relief⁸ is to give sufficient notice to

3. See *infra* notes 9-10 and accompanying text (discussing the notice element of Federal Rule of Civil Procedure 8).

4. See *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986) (noting that the Court had “rejected an approach that pleading [was] a game of skill in which one misstep [could] be decisive” (citing *Conley v. Gibson*, 355 U.S. 41, 48 (1957), *abrogated by Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1968-69 (2007))); *Foman v. Davis*, 371 U.S. 178, 181 (1962) (stating that it is “entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of . . . mere technicalities”).

5. See, e.g., *Ogden v. San Juan County*, 32 F.3d 452, 455 (10th Cir. 1994) (“[A]ppellant’s *pro se* status does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure.”); *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) (“Pro se litigants must follow the same rules of procedure that govern other litigants.”).

6. FED. R. CIV. P. 8(a)(2). For further discussion on Rule 8 pleading requirements, see CHARLES ALAN WRIGHT & MARY KAY KANE, *LAW OF FEDERAL COURTS* § 68 (6th ed. 2002).

7. The Rules arose out of an evolving American movement away from the formal rigidity of the common law pleading practice and toward a more simplified pleading system. See JACK FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 5.1 (4th ed. 2005); WRIGHT & KANE, *supra* note 6, §§ 66, 68. In accord with this movement, the Supreme Court promulgated the Rules in 1938. See FRIEDENTHAL ET AL., *supra*, § 5.7, at 267. Of particular note, Rule 8 simplified and liberalized the federal pleading standard, creating a process in which the primary function of the complaint is to give fair notice to the adverse party. See FRIEDENTHAL ET AL., *supra*, § 5.7; WRIGHT & KANE, *supra* note 6, § 68, at 471.

8. *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 514 (2002) (“The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus

the adverse party⁹ even if the plaintiff fails to adequately identify the legal theory for relief or detail relevant facts.¹⁰

Over fifty years ago the Supreme Court in *Conley v. Gibson*¹¹ set out to create a broad, principled method for judges to use in assessing the facial validity of a complaint based on the language and purpose of the liberalized system of

litigation on the merits of a claim.”).

9. The Supreme Court initially addressed the function of a pleading in *Conley*, 355 U.S. at 47-48. The Court faced a challenge to the sufficiency of a complaint against a union by African-American railway workers who had alleged racial discrimination in violation of federal law. *Id.* at 42-43. In upholding the sufficiency of the complaint, the Court clarified that the plaintiffs need not set out specific or detailed facts to support a claim for relief. *Id.* at 47. Rule 8 simply required “‘a short and plain statement of the claim’ that [would] give the defendant fair notice of what the plaintiff’s claim [was] and the grounds upon which it rest[ed].” *Id.* The Court made clear that the plaintiff was not obligated to “detail the facts on which he base[d] his claim.” *Id.* In giving effect to these notice pleading requirements and the directive of Federal Rule of Civil Procedure 8(f), which requires construction of pleadings “to do substantial justice,” the Supreme Court made clear that “[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Id.* at 48; accord Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 434 (1986) (noting that “*Conley v. Gibson* put the Supreme Court on record as clearly favoring the liberal view [of pleading]”); see also *infra* notes 11-29 and accompanying text.

10. See FRIEDENTHAL ET AL., *supra* note 7, § 5.7; WRIGHT & KANE, *supra* note 6, § 68, at 470-71, 473-74 (both noting that the Rules include techniques such as discovery and summary judgment to fill the roles of determining all the facts, narrowing the issues, and providing speedy disposition); see also Swierkiewicz, 534 U.S. at 511-12 (stating that Rule 8(a) requires that a Title VII plaintiff plead enough to provide notice of the claim, but need not allege a prima facie case); *United States v. N. Trust Co.*, 372 F.3d 886, 888 (7th Cir. 2004) (“Even with respect to elements of the plaintiff’s claim, complaints need not plead facts or legal theories.”); *Fontana v. Haskin*, 262 F.3d 871, 877 (9th Cir. 2001) (“Specific legal theories need not be pleaded so long as sufficient factual averments show that the claimant may be entitled to some relief.”); *Simonton v. Runyon*, 232 F.3d 33, 36-37 (2d Cir. 2000) (“[G]enerally a complaint that gives full notice of the circumstances giving rise to the plaintiff’s claim for relief need not also correctly plead the legal theory or theories and statutory basis supporting the claim.” (quoting *Marbury Mgmt., Inc. v. Kohn*, 629 F.2d 705, 712 n.4 (2d Cir. 1980))); *C&F Packing Co. v. IBP, Inc.*, 224 F.3d 1296, 1306 (Fed. Cir. 2000) (“A complaint need not specify the correct legal theory, or point to the right statute, to survive a motion to dismiss.”); *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 167 (5th Cir. 2000) (“The form of the complaint is not significant if it alleges facts upon which relief can be granted, even if it fails to categorize correctly the legal theory giving rise to the claim.” (quoting *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 604 (5th Cir. Nov. 1981))); *Williams v. Midwest Airlines*, 321 F. Supp. 2d 993, 994 (E.D. Wis. 2004) (“It is not necessary for a plaintiff to identify in the complaint the legal theories on which he intends to proceed.”).

11. 355 U.S. 41 (1957), *abrogated by* *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1968-69 (2007).

notice pleading.¹² The oft-quoted language of *Conley* provides: “[W]e follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”¹³

Following *Conley*, the conventional wisdom was that a pleading could pass muster as long as the claimant could prove any set of facts, consistent with the complaint, which might justify relief.¹⁴ While this liberal standard of pleading interpretation theoretically prevented dismissal of a complaint due simply to defects in form or inartful pleading style, critics asserted that under this broad standard virtually any complaint or claim could survive a motion to dismiss.¹⁵ Indeed, this liberal standard of pleading review would permit many implausible claims to survive a motion to dismiss.¹⁶ Moreover, since the system allowed implausible claims to survive the pleading stage of litigation, the stated test rarely commanded the degree of obedience from the courts that one would have expected.¹⁷

Virtually from the start, courts devised inroads which would permit more careful scrutiny of claims regarded as implausible.¹⁸ For example while federal

12. *Id.* at 45-46.

13. *Id.*

14. *See, e.g.,* WRIGHT & KANE, *supra* note 6, § 68. As Professor Charles Wright observes, whether a plaintiff is pro se or represented by counsel, a complaint cannot be dismissed unless it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of its allegations. This rule, which has been stated literally thousands of times, precludes final dismissal for insufficiency of the complaint except in the extraordinary case in which the pleader makes allegations that show on the face of the complaint some insuperable bar to relief.

Id. at 474 (footnote omitted).

15. As the Court recently observed in *Twombly*, 127 S. Ct. at 1969, “a good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard.” (citing *Ascon Props., Inc. v. Mobil Oil Co.*, 866 F.2d 1149, 1155 (9th Cir. 1989); *McGregor v. Indus. Excess Landfill, Inc.*, 856 F.2d 39, 42-43 (6th Cir. 1988); *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984); *O’Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976)).

16. Only those claims that “beyond doubt . . . the plaintiff [could] prove no set of facts in support of his claim would entitle him to relief” could be dismissed. *Conley*, 355 U.S. at 45-46.

17. *See Car Carriers, Inc.*, 745 F.2d at 1106 (“*Conley* has never been interpreted literally.” (citing *Sutliff, Inc. v. Donovan Cos.*, 727 F.2d 648, 654 (7th Cir. 1984))); *see also Twombly*, 127 S. Ct. at 1969 (stating that *Conley*’s “no set of facts” language has been questioned, criticized, and explained away”).

18. *See* Geoffrey C. Hazard, *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1672 (1998) (while noting Rule 8 and compliance with *Conley v. Gibson* appears to permit a litigant to simply state the parties’ names and a demand for judgment, in reality “plaintiffs in American litigation actually plead with the kind of specificity required elsewhere in the world. Doing so helps the judge understand what the case is about, and it incidentally helps the opposing side”); Marcus, *supra* note 9, at 462-65; *see also Ascon Props., Inc.*, 866 F.2d at 1155 (noting that *Conley*

courts acknowledged the extraordinarily liberal pleading standard articulated in *Conley*, federal courts also: (1) interjected a requirement that the claimant have a “‘reasonably founded hope that the [discovery] process [would] reveal relevant evidence’ to support [the] claim”;¹⁹ (2) declined to assume facts not alleged;²⁰ (3) rejected allegations in a complaint that were regarded as “conclusory” or “conjectural”;²¹ and (4) emphasized that Rule 8 requires “that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”²² The inconsistency between the language of *Conley* and the reality of practice proved transparent, as courts frequently gave lip-service to *Conley*’s sweeping language while creating more and more ways to restrict litigation regarded as implausible or frivolous.²³

This phenomenon proved to be particularly pronounced in prisoner litigation,²⁴ where many ad hoc, unskilled claimants proceeded pro se and

“unfortunately provided conflicting guideposts” and stating that the Supreme Court had “elsewhere hinted that sometimes more particularity in pleading [could] be required”); *Car Carriers, Inc.*, 745 F.2d at 1106 (stating that “*Conley* has never been interpreted literally” (citing *Sutliff*, 727 F.2d at 654)).

19. *Twombly*, 127 S. Ct. at 1969 (quoting *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

20. *See* *Associated Gen. Contractors of Cal., Inc. v. Cal. Council of Carpenters*, 459 U.S. 519, 526 (1983) (“It is not . . . proper to assume that the Union can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged.”); *see also* *McGregor*, 856 F.2d at 43 (stating that “‘when a plaintiff . . . supplies facts to support his claim, we do not think that *Conley* imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim into a substantial one [W]hen a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist” (quoting *O’Brien*, 544 F.2d at 546 n.3 (citations omitted))).

21. *Warth v. Seldin*, 422 U.S. 490, 501 (1975) (recognizing the *Conley* pleading standard, but adding that “it is within the trial court’s power to allow or to require the plaintiff to supply, by amendment to the complaint or by affidavits, further particularized allegations of fact deemed supportive of plaintiff’s standing”); *see also* *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (stating that on review of the sufficiency of a complaint, the court is “not bound to accept as true a legal conclusion couched as a factual allegation”).

22. *Twombly*, 127 S. Ct. at 1959 (quoting FED. R. CIV. P. 8(a)(2)).

23. *See* *O’Brien*, 544 F.2d at 546 n.3 (“[W]hen a plaintiff under 42 U.S.C. § 1983 supplies facts to support his claim, we do not think that [*Conley*] imposes a duty on the courts to conjure up unpleaded facts that might turn a frivolous claim of unconstitutional official action into a substantial one.”); *see also* *Butz v. Economou*, 438 U.S. 478, 507-08 (1978) (dictum) (suggesting that “[i]nsubstantial” cases can be dismissed despite “artful pleading”). *But cf.* *Hazard*, *supra* note 18, at 1672 (“Although Rule 8 permits a claimant to plead in vacuous terms, ordinarily plaintiffs in American litigation actually plead with the kind of specificity required elsewhere in the world.”); *Marcus*, *supra* note 9, at 434 (“Although *Conley v. Gibson* put the Supreme Court on record as clearly favoring the liberal view, the actual application of its admonition in subsequent cases was more problematic.”).

24. Prisoner litigation is a relatively recent phenomenon. *See* Brian Ostrom et al., *Congress*,

Courts and Corrections: An Empirical Perspective on the Prison Litigation Reform Act, 78 NOTRE DAME L. REV. 1525, 1529-32 (2003); Margo Schlanger, *Civil Rights Injunctions Over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 558-64 (2006) [hereinafter Schlanger, *Civil Rights Injunctions*]; see also Drew Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1539-46 (2005) (discussing a general rise of pro se litigation).

The rise of modern prisoner litigation can be traced to the general expansion of civil rights litigation that occurred during the 1960s and 1970s. See Ostrom et al., *supra*, at 1529-32; Schlanger, *Civil Rights Injunctions*, *supra*, at 558-61.

By the mid-1960s, federal courts provided remedies to prisoners seeking relief from unconstitutional prison conditions under 42 U.S.C. § 1983. See, e.g., *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (per curiam) (holding that a prisoner had stated a claim for relief under 42 U.S.C. § 1983 when he had alleged denial of “permission to purchase certain religious publications and denied other privileges enjoyed by other prisoners”).

By 1973, the Court acknowledged “recent decisions upholding the right of state prisoners to bring federal civil rights actions to challenge the conditions of their confinement.” *Preiser v. Rodriguez*, 411 U.S. 475, 498 (1973). The cases that the *Rodriguez* court acknowledged were *Haines v. Kerner*, 404 U.S. 1519 (1972); *Wilwording v. Swenson*, 404 U.S. 249 (1971); *Houghton v. Shafer*, 392 U.S. 639 (1968); and *Cooper*, 378 U.S. 546. The Court found that such cases “establish that a § 1983 action is a proper remedy for a state prisoner who is making a constitutional challenge to the conditions of his prison life, but not to the fact or length of his custody.” *Rodriguez*, 411 U.S. at 499.

Some prisoner litigation involves class action suits brought against prison officials or other appropriate authorities for large-scale, systemic, and supervised injunctions against unconstitutional conditions of confinement. See Ostrom et al., *supra*, at 1527-28; Edward Rubin & Malcolm Feeley, *Judicial Policy Making and Litigation Against the Government*, 5 U. PA. J. CONST. L. 617, 618-19 (2003) (discussing role of court in creating prison reform policy); Schlanger, *Civil Rights Injunctions*, *supra*, at 558-69; see also *Gates v. Cook*, 376 F.3d 323 (5th Cir. 2004) (class action brought by death row inmates housed in Unit 32-C at the Mississippi State Penitentiary, involving numerous allegations concerning unconstitutional living conditions on Death Row); *Armstrong v. Davis*, 275 F.3d 849 (9th Cir. 2001) (class action brought by disabled California prisoners who obtained system-wide injunctive relief for statutory violations); *Harris v. Angelina County*, 31 F.3d 331 (5th Cir. 1994) (affirming the district court injunction in a prisoner class action that imposed a cap on the number of prisoners as a remedy to unconstitutional conditions of confinement); *Knop v. Johnson*, 667 F. Supp. 467 (W.D. Mich. 1987) (class action prisoner suit in which the district court ordered the prison to provide inmates with adequate winter clothing and adequate access to lavatory facilities).

Other prison litigation involves a single prisoner, often proceeding pro se, seeking injunctive or monetary redress for individual grievances such as use of excessive force by prison officials, unconstitutional living conditions, risk of harm from other prisoners, and deliberate indifference to medical needs. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (stating that prison officials’ deliberate indifference to substantial risk of serious harm, including risk of harm from other prisoners, may violate the Eighth Amendment and is, therefore, actionable in a § 1983 proceeding); *Estelle v. Gamble*, 429 U.S. 97, 103-05 (1976) (stating that deliberate indifference to a prisoner’s medical needs may violate the Eighth Amendment and, therefore, is actionable in a §

frequently raised claims that courts deemed implausible or frivolous.²⁵ Rather than confront this disconnect between reality and the pleading ideal, avoidance became a particularly powerful incentive as courts struggled to confront a rapid rise in prisoner litigation.²⁶ The result was that many claims regarded as implausible, nonetheless, easily survived the conventional test for dismissal.²⁷

With continued attention to implausible claims, the Supreme Court recently elevated the legal consequences of skepticism.²⁸ In doing so, the Supreme Court treated the fifty-year-old *Conley* standard as if it were but a relic²⁹ and held that

1983 proceeding); *see also* *Porter v. Nussle*, 534 U.S. 516, 520 (2002) (involving an inmate's allegations of "a prolonged and sustained pattern of harassment and intimidation"); *Lenz v. Wade* 490 F.3d 991, 993-94 (8th Cir. 2007) (involving a prisoner's allegation of excessive force).

25. *See* Ostrom et al., *supra* note 24, at 1539-40 (graphically illustrating and analyzing the large number of court dismissals).

26. While prisoner litigation expanded dramatically, many pro se prisoner claims were dismissed as frivolous. *See* Jon Newman, *Pro Se Prisoner Litigation: Looking for Needles in Haystacks*, 62 BROOK. L. REV. 519, 519 (1996). By the mid-1990s, both types—class-action suits and suits raising individual prisoner claims—of prisoner litigation came under significant scrutiny and a great deal of criticism. *See, e.g.*, Lynn Branham, *The Prison Litigation Reform Act's Enigmatic Exhaustion Requirement: What It Means and What Congress, Courts and Correctional Officials Can Learn From It*, 86 CORNELL L. REV. 483, 520-26 (2001) (noting the mid-1990's responses of (1) state attorney generals, (2) Congress and (3) the Second Circuit); Newman, *supra*, at 520-26; Ostrom et al., *supra* note 24, at 1525-27; Kermit Roosevelt III, *Exhaustion under the Prison Litigation Reform Act: The Consequence of Procedural Error*, 52 EMORY L.J. 1771, 1771-73 (2003); Schlanger, *Civil Rights Injunctions*, *supra* note 24, at 589-602; Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1626-33 (2003) [hereinafter Schlanger, *Inmate Litigation*]; Mark Tushnet & Larry Yackle, *Symbolic Statutes and Real Laws: The Pathologies of the Antiterrorism and Effective Death Penalty Act and the Prison Litigation Reform Act*, 47 DUKE L.J. 1, 18-20 (1997); *see generally* Michael Zachary, *Dismissal of Federal Actions and Appeals Under 28 U.S.C. §§ 1915(e)(2) and 1915a(b)*, 42 U.S.C. § 1997e(c) and *The Inherent Authority of the Federal Courts: (A) Procedures for Screening and Dismissing Cases; (B) Special Problems Posed By the "Delusional" or "Wholly Incredible" Complaint*, 43 N.Y.L. SCH. L. REV. 975 (1999-2000) (discussing statutory changes PLRA brought to prisoner litigation).

27. *See supra* notes 14-23 and accompanying text.

28. *See* *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969-74 (2007).

29. The Supreme Court observed, "[A] good many judges and commentators have balked at taking the literal terms of the *Conley* passage as a pleading standard." *Id.* at 1969. Joining these critics, the Court added:

To be fair to the *Conley* Court, the passage should be understood in light of the opinion's preceding summary of the complaint's concrete allegations, which the Court quite reasonably understood as amply stating a claim for relief. But the passage so often quoted fails to mention this understanding on the part of the Court, and after puzzling the profession for 50 years, this famous observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.

to survive dismissal under Rule 12(b)(6), the plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.”³⁰

B. Equal Application of Procedural Rules and the Pro Se Litigant

The schism in American law also found expression in conflicting modes of enforcement for procedural rules that were seemingly mandatory for all litigants. Virtually all judges paid lip-service to the notion that pro se litigants had to follow generally applicable procedural rules notwithstanding the litigant’s frequent lack of legal training, education, and/or resources.³¹ However, the inflexibility of this view implicates identical treatment for both plausible and implausible claims. The problem is that pro se litigants often lack the knowledge or experience to discern differences in the requirements of various procedural rules, such as the variety of responses required for an answer to a motion to dismiss or a motion for summary judgment.³² This lack of knowledge could result in dismissal of an otherwise meritorious claim. Skeptical of the rigidity in this approach, with identical treatment of counseled and uncounseled litigants, courts struggled to create ways for plausible inmate suits to survive despite procedural irregularities.

One such method involved the creation of ad hoc requirements for judges to advise litigants about the rules before enforcing them.³³ While some courts have

Id.

30. *Id.* at 1974.

31. See, e.g., *Pomales v. Celulares Telefonica, Inc.*, 342 F.3d 44, 49 n.4 (1st Cir. 2003) (“[Plaintiff’s] temporary pro se status did not absolve her of the need to comply with the Federal Rules of Civil Procedure or the district court’s procedural rules.”); *Creative Gifts, Inc. v. UFO*, 235 F.3d 540, 549 (10th Cir. 2000) (“Although pro se litigants get the benefit of more generous treatment in some respects, they must nonetheless follow the same rules of procedure that govern other litigants.”); *LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 1995) (“Although [pro se] litigants should be afforded latitude, they ‘generally are required to inform themselves regarding procedural rules and to comply with them.’” (quoting *Edwards v. INS*, 59 F.3d 5, 8 (2d Cir. 1995) (citation omitted))).

32. See, e.g., *Pierce v. City of Miami*, 176 F. App’x 12, 14 (11th Cir. 2006) (noting that “although pro se litigants are still bound by rules of procedure, . . . they should not be held to the same level of knowledge as an attorney”); *In re T.R. Acquisition Corp.*, No. 99-5013, 1999 WL 753335, at *1 n.1 (2d Cir. Sept. 16, 1999) (noting that “[pro se] litigants . . . generally lack specific knowledge of . . . legal procedures”).

33. For example, Rule 56(c) requires a party to present evidence if the adversary’s motion for summary judgment would otherwise reflect the absence of a genuine issue of material fact. FED. R. CIV. P. 56(c). Nonetheless, “[t]he majority of circuits have held that a pro se litigant is entitled to notice of the consequences of a summary judgment motion and the requirements of the summary judgment rule.” *United States v. Ninety-Three (93) Firearms*, 2003 FED App. 0157P, at 20, 330 F.3d 414, 427 (6th Cir. 2003) (citing cases from the Second, Fourth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits) (footnote omitted).

declined to require such advice,³⁴ even those courts have devised ways of protecting pro se litigants from procedural mishaps.³⁵ For example, one court recognized the power to dismiss claims that violate Rule 8, but suggested that judges should not order dismissal of pro se complaints unless they have explained for a “lay person . . . what judges and lawyers mean when speaking of a short and plain statement consistent with Rule 8.”³⁶ In contrast, attorneys violating the rule do not receive the same judicial advice before their suits are dismissed.³⁷

II. REACTION TO THE SCHISMS AND INTERPRETATIVE CONFLICTS: EMERGENCE OF MULTIPLE APPROACHES TO PRO SE LITIGATION

The schisms in the approaches to dismissal and procedural compliance have coalesced in a multi-faceted blend in how judges approach pro se litigation. The liberality of the standard for dismissal would permit innumerable suits to proceed despite deep skepticism of their underlying merit. The recently-imposed test of plausibility³⁸ creates an opportunity for courts to impose their own beliefs about the merit of the underlying suit despite the superficial liberality of the standard for dismissal. The continuum between the flexibility of Rule 8 and the subjective ingredient of plausibility allows the courts to form ad hoc devices to impose their own beliefs in a system supposedly based on objectivity and uniformity.

Even worse, a forum predicated on blind justice has evolved into a system that reflects a keen eye for the persona of the litigant.³⁹ Certain rules govern pro se litigants, while other rules govern parties represented by lawyers.⁴⁰ Sometimes the pro se litigants are favored;⁴¹ sometimes they are disfavored.⁴² Moreover,

34. See, e.g., *Nasious v. Two Unknown B.I.C.E. Agents*, 492 F.3d 1158, 1162 (10th Cir. 2007) (noting that “a district court may, without abusing its discretion, enter [an order dismissing a pro se complaint for failure to comply with Rule 8] without attention to *any particular procedures*”).

35. See, e.g., *id.* (noting that no particular warning must be given, but that a number of criteria should be considered before dismissing a pro se complaint).

36. *Id.* at 1163; see also Howard Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 441-44 (1993) (discussing a prisoner’s ability as a pro se plaintiff to draft viable complaints and the responses of the courts to liberally construe such pro se pleadings).

37. *Nasious*, 492 F.3d at 1163 n.5 (“[W]e expect counsel to know the pleading rules of the road without being given personal notice of them by the district court. Our concern here is with the [pro se] litigant unschooled in the law.”).

38. See *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007); see also *supra* notes 29-30 and accompanying text.

39. See, e.g., Eisenberg, *supra* note 36, at 443-44 (discussing courts’ treatment of pro se prisoners); Marcus, *supra* note 9, at 477 (discussing the disproportionate treatment of pro se prisoners in court dismissals of their complaints).

40. See *supra* notes 36-37 and accompanying text.

41. See Schlanger, *Civil Rights Injunctions*, *supra* note 24, at 558-64 (discussing the

sometimes the pro se litigants are lawyers,⁴³ resulting in either foolish paternalism or unprincipled assessments of their legal ability.⁴⁴ The multiplicity of interpretative approaches and degrees of judicial intervention derive from the array of subjective standards applied to review of pleadings, which, in turn, evolve from judicial efforts to blend disparate tests, inconsistent approaches to procedural requirements, and varying attitudes towards pro se litigation.⁴⁵

With increasing subjectivity, courts have placed their gloss on various procedural rules.⁴⁶ The opportunity to do so has resulted from the loosening of principle⁴⁷ and elevation of the judge's dual role as the guardian and gatekeeper

prisoners' pro se litigation success in creating institutional change of the early 1960s and 1970s); Swank, *supra* note 24, at 1552-53 (discussing a court based pro se assistance program).

42. Ostrom et al., *supra* note 24, at 1529-60 (noting the historical trends in treatment of pro se prisoner claims both before and after the enactment of the PLRA and the statistical analysis of case dismissals corresponding with those timelines); Schlanger, *Civil Rights Injunctions*, *supra* note 24, at 558-69; *see also* Swank, *supra* note 24, at 1548 (noting the negative anecdotal impressions of pro se litigants).

43. *See, e.g.*, *Smith v. N.Y. Presbyterian Hosp.*, 254 F. App'x 68, 70 (2d Cir. 2007); *Harbulak v. Suffolk County*, 654 F.2d 194, 198 (2d Cir. 1981).

44. When an attorney appears pro se, some courts have decided whether to liberally construe the pleadings based on whether the litigant was practicing law at the time. *Compare Harbulak*, 654 F.2d at 198 (holding that because a pro se litigant was a practicing lawyer, he was not entitled to "the special consideration customarily" available to unrepresented parties), *with N.Y. Presbyterian Hosp.*, 254 F. App'x at 70 (even though "licensed attorneys" need not be afforded special "pleading consideration" when they appear without legal representation, the plaintiff was entitled to treatment as a pro se litigant because she had "not practiced law for years" as a result of "psychiatric impairments"). When the party is not an attorney, some courts have still applied "a sliding scale of liberality" depending on the litigant's level of experience in the legal system. *E.g.*, *Standley v. Dennison*, No. 9:05-CV-1033 (GLS/GHL), 2007 WL 2406909, at *7-8 (N.D.N.Y. Aug. 21, 2007); *Holsey v. Bass*, 519 F. Supp. 395, 407 n.27 (D. Md. 1981); *see also* Michael J. Mueller, Note, *Abusive Pro Se Plaintiffs in the Federal Courts: Proposals for Judicial Control*, 18 U. MICH. J.L. REFORM 93, 98 n.14 (1984) ("Some courts have adopted a 'sliding scale of liberality' that places experienced pro se litigants somewhere between the uninitiated and trained lawyers.").

45. Many legal scholars have written about the political, social and judicial reaction to the prisoner litigation of the 1960s and 1970s. *See generally* Branham, *supra* note 26, at 484-97; Ostrom et al., *supra* note 24, at 1525-32; Schlanger, *Civil Rights Injunctions*, *supra* note 24, at 550-612; Schlanger, *Inmate Litigation*, *supra* note 26, at 1590-1627; Zachary, *supra* note 26 (comparing throughout prisoner litigation pre-PLRA and post-PLRA).

46. *See infra* notes 55, 58 and accompanying text.

47. *See* Cynthia Gray, *Reaching Out or Overreaching: Judicial Ethics and Self-Represented Litigants*, 27 J. NAT'L ASSOC. ADMIN. L. JUDICIARY 97, 101 (2007) ("Case after case announces 'the hoary but still vigorous rule' that self-represented litigants are held to the same standard as attorneys - and then case after case, often the same cases, describes exceptions to that rule and the special treatment trial judges should accord to those without attorneys." (quoting *Gamet v. Blanchard*, 111 Cal. Rptr. 2d 439, 447 (Dist. Ct. App. 2001))).

of pro se litigation.⁴⁸

A. *Haines v. Kerner*: *Enhanced Liberal Construction for Pro Se Pleadings*

The dual rule of the judge is manifest in how courts have treated an otherwise innocuous passage in the *Haines v. Kerner*⁴⁹ per curiam opinion issued thirty-six years ago.⁵⁰ In *Haines*, the Supreme Court applied the *Conley* pleading standard⁵¹ for review of the viability of complaints in light of the litigant's pro se status.⁵² In that context, the *Haines* Court stated:

Whatever may be the limits on the scope of inquiry of courts into the internal administration of prisons, allegations such as those asserted by petitioner, however inartfully pleaded, are sufficient to call for the opportunity to offer supporting evidence. We cannot say with assurance that under the allegations of the pro se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."⁵³

Although the *Haines* Court relaxed the pleading standard for the pro se plaintiff, the Court did not define the degree of relaxation in comparison to the pro se liberal notice pleading rules applicable to all litigants in Rule 8.⁵⁴ Not

48. For example, one cynic described the judge's choice of competing principles when a party appears pro se:

While the principles may govern the decisions in one sense, the facts drive the selection of the principles. One can almost predict the outcome, and the choice of articulated principles, from the annoyance level of the court. The more annoyed the court is with an unrepresented litigant, the more likely the invocation of precedent requiring impartiality, the application of similar rules, and a prohibition of playing advocate for the litigant. The more sympathetic the litigant, and the more the absence of counsel seems beyond the litigant's control, the more likely the court will be to articulate a need to provide additional assistance to avoid a miscarriage of justice.

Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 *FORDHAM L. REV.* 1987, 2015 (1999).

49. 404 U.S. 519 (1972) (per curiam).

50. The passage from *Haines* is cited *infra* note 53.

51. The *Conley* pleading standard is set forth *supra* in the text accompanying note 13. It is important to remember that the *Conley* standard preceded the *Twombly* standard.

52. *Haines*, 404 U.S. at 520-21; *see also* *Estelle v. Gamble*, 429 U.S. 97, 112 (1976) (Stevens, J., dissenting) (stating that the test in *Haines* is "whether the Court can say with assurance on the basis of the complaint that, beyond any doubt, no set of facts could be proved that would entitle the plaintiff to relief").

53. *Haines*, 404 U.S. at 520-21 (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

54. *See* *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (per curiam) (in a post-*Twombly* decision involving pro se prisoners, the Court noted that pro se pleadings must "be liberally construed" and are "held to less stringent standards than formal pleadings drafted by lawyers")

surprisingly, federal courts take varying approaches regarding “how liberal” the construction of pro se pleadings should be.⁵⁵

With the deterioration in objective standards and the intensification of judges’ reliance on their own beliefs, the innocuous passage in *Haines* has become a mirror for courts to act on their own perceptions of the plausibility of the underlying litigation.⁵⁶ Ideally, under *Haines*, plausible claims proceed while

(quoting *Estelle*, 429 U.S. at 106 (majority opinion))).

55. For example, the Tenth Circuit in *Hall v. Bellmon*, 935 F.2d 1106, 1110 (10th Cir. 1991), opined:

A pro se litigant’s pleadings are to be construed liberally and held to a less stringent standard than formal pleadings drafted by lawyers. We believe that this rule means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so despite the plaintiff’s failure to cite proper legal authority, his confusion of various legal theories, his poor syntax and sentence construction, or his unfamiliarity with pleading requirements.

Id. (citations omitted).

Perhaps echoing the policy of protection of prisoners and liberal construction of such pro se pleadings, the District Court for Massachusetts stated:

As a marginalized group, prisoners are especially apt to require judicial protection. The United States has both a strong commitment to human rights and a clear history of human rights violations against prisoners, making such protection particularly appropriate and necessary. In light of these legal and empirical factors, courts should read prisoner petitions generously, give them careful consideration, and resolve statutory ambiguities in prisoners’ favor.

Kane v. Winn, 319 F. Supp. 2d 162, 175 (D. Mass. 2004).

Some commentators have expressed concern that pro se pleadings actually are treated more harshly than other pleadings, apparently in an effort to clear court dockets of unwanted litigation involving pro se inmates. Professor Howard Eisenberg observes:

Although courts routinely pay lip service to the liberal construction of pro se pleadings, as required by the Supreme Court in *Kerner*, there is a nagging concern among those few independent persons who have reviewed prisoner cases that the district courts are actually applying very different criteria when trying to rid their docket of pesky prisoner litigation. One commentator, who reviewed only reported district and courts of appeal decisions, found that a significant number of courts have applied stringent pleading standards to pro se plaintiffs, ignoring the explicit directions of *Haines v. Kerner* or “giving its language only superficial acknowledgment.”

Eisenberg, *supra* note 36, at 443 (footnote omitted) (citing and quoting Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 971-72 (1990)).

56. One student commentator notes:

[The] limitation [in *Haines*] is read differently by each court in terms of how liberally, and to which pleadings the rule applies. This results in inconsistent treatment of pro se litigants in the lower courts. For example, some courts rely upon the Supreme Court’s rationale in *Haines* to fashion a relaxed set of pro se standards for procedural conformity, particularly when dealing with summary judgment proceedings, compliance

implausible ones do not. The trouble is that plausibility is inherently subjective and judges likely gauge “plausibility” differently based on their ideologies, attitudes, and experiences.

B. The Rise in Subjectivity

Without objective standards to provide guidance, courts have chosen to decide for themselves which pro se cases are plausible and which are not.⁵⁷ Not surprisingly, judges have erected their own artifices to allow pro se cases to survive an infinite variety of procedural traps.⁵⁸

Seeking to relieve pro se litigants of various procedural traps, courts have created new, unanticipated dangers. Tangibly, such relief has resulted in unintended consequences for the litigants chosen for favorable treatment.⁵⁹ Intangibly, judicial benevolence has resulted in a softening of the distinction between advocacy and neutrality.⁶⁰ For example, courts have utilized ad hoc rules to interpret or advance a pro se litigant’s perceived grievance, such as recharacterizing suits under 42 U.S.C. § 1983 as habeas petitions,⁶¹ advising litigants how to comply with rules,⁶² and warning litigants of the need to comply with procedural requirements.⁶³ With the emergence of these rules, courts frequently struggle to maintain their neutrality when called on to perform functions typically associated with advocacy.

Judicial efforts to forecast the effects of various constructions on the pro se litigant illustrate this loss in objectivity. Without legislative power, the judiciary is at a loss to predict these effects. Two examples arose in 1995 and 1996 with Congress’s enactment of the Prison Litigation Reform Act of 1995 (PLRA)⁶⁴ and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).⁶⁵ The two

with discovery rules, the imposition of sanctions, and the introduction of evidence. A greater number of courts . . . take a more traditional approach and extend this sort of pleading leniency only to the substantive issues raised, while continuing to strictly enforce compliance with procedural requirements by pro se litigants.

Tiffany Buxton, Note, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RES. J. INT’L L. 103, 117-18 (2002) (footnotes omitted).

57. See *supra* notes 47-48, 55 and accompanying text.

58. See, e.g., *McDonald v. Hall*, 610 F.2d 16, 20 (1st Cir. 1979) (Campbell, J., dissenting) (suggesting that the majority “ben[t] over backwards to excuse the omission of allegations of the basic facts needed to make out a possible claim”).

59. See *infra* notes 80-87 and accompanying text.

60. See *supra* notes 33-36 and accompanying text; see also *infra* notes 100-01, 115-22 and accompanying text.

61. See *infra* notes 102-08 and accompanying text.

62. See *supra* notes 33-37 and accompanying text.

63. See *infra* notes 115-22 and accompanying text.

64. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, § 101, 110 Stat. 1321 (1996).

65. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-32, 110 Stat.

laws brought to the surface the futility and danger of compensating for a party's lack of legal representation.

C. The PLRA's Impact on Judicial Construction of Pro Se Complaints

With the PLRA, Congress hoped to curtail the flood of inmate litigation.⁶⁶ In many ways, the PLRA reflected legislative frustration with the rise of prisoner litigation and the perceived intrusion of the federal judiciary in the operation of state prison systems.⁶⁷ That frustration is evident in the statutory hurdles facing inmates who seek judicial review of prison conditions. Two important components of this effort were (1) the requirement of administrative exhaustion of claims⁶⁸ and (2) restrictions on inmates' eligibility for pauper status.⁶⁹

The PLRA requires inmates to exhaust available administrative remedies before suing under federal law based on conditions within the prison.⁷⁰ The exhaustion provision creates tension with twenty-four years of precedent, originating in *Haines v. Kerner*,⁷¹ in which federal courts had struggled to identify the causes of action encompassed in many prisoner complaints.⁷²

Federal courts have long discarded the ancient requirement for a litigant to identify his legal theories in the complaint.⁷³ As a result, even for parties

1214 (1996).

66. See Newman, *supra* note 26, at 522.

67. See 141 Cong. Rec. S14, 413 (1995) (statement of Sen. Dole).

68. Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e(a) (2000).

69. Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(g) (2000).

70. 42 U.S.C. § 1997e(a) (2000).

71. 404 U.S. 519 (1972) (per curiam).

72. As noted earlier, often prisoner complaints involve inartful, mislabeled or muddled allegations and claims for relief. Often the litigants are poorly educated and are unable to craft a document like a lawyer. These defects often mean that the court has to wade through the pleading to discern what the allegations are, what claims for relief these allegations support, and sometimes even who the alleged defendants are. See, e.g., *Crooks v. Nix*, 872 F.2d 800, 801 (8th Cir. 1989) (employing liberal construction of pleading to discern relevant defendants and claims); *Haley v. Dormire*, 845 F.2d 1488, 1490 (8th Cir. 1988) (reversing dismissal of pro se prisoner complaint because when "read expansively" the complaints set forth sufficient claims for relief); *Massop v. Coughlin*, 770 F.2d 299, 301 (2d Cir. 1985) (per curiam) (although district court could not find a constitutional claim based on the allegations in the prisoner's complaint, Second Circuit remanded finding that applying liberal standard of review, prisoner set forth sufficient allegations that the prison guard intentionally injured him); *Marshall v. Brierley*, 461 F.2d 929, 930 (3rd Cir. 1972) (reviewing complaint filed by a prisoner with "only minimal literary skills" and finding sufficient grounds to allow complaint to go forward).

73. Judge Easterbrook explained, "A drafter who lacks a legal theory is likely to bungle the complaint (and the trial); you need a theory to decide which facts to allege and prove. But the complaint need not identify a legal theory, and specifying an incorrect theory is not fatal." *Bartholet v. Reishauer A.G. (Zurich)*, 953 F.2d 1073, 1078 (7th Cir. 1992); see also *supra* notes 13-17 and accompanying text.

enjoying legal representation, the courts read into the complaint all causes of action fairly encompassed by the pleader's factual allegations.⁷⁴ This exercise often proves to be simple when the plaintiff enjoys legal representation,⁷⁵ but the process becomes far more problematic when the plaintiff lacks legal training or representation.⁷⁶ In the absence of such training or representation, litigants often try to express their claims without the ability to pinpoint the misdeeds that are actionable.

Deciphering these complaints frequently required courts to decide whether to err on the side of a narrow construction or a generous one. One option involved strict adherence to inartful and, perhaps, unintended language of the pro se complaint itself.⁷⁷ Another option was to construe the complaint to fairly encompass all claims fairly raised by the pro se litigant's pleading.⁷⁸

Prior to 1996, courts had little reason to read complaints narrowly. With generous construction, courts could ferret out the viable claims, and if the courts proved overly generous in their construction, pro se litigants could drop any claims that they had not intended to insert. As a result, judges often interpreted pro se complaints to include whatever legal theories could be encompassed by the plaintiff's factual allegations.⁷⁹

74. Professors Wright and Miller state:

The federal rules, and the decisions construing them, evince a belief that when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining a defense upon the merits.

5 CHARLES ALAN WRIGHT & ARTHUR MILLER, *FEDERAL PRACTICE AND PROCEDURE: CIVIL* § 1219, at 281-83 (3d ed. 2004) (footnote omitted).

75. *See supra* note 37 and accompanying text.

76. *See supra* note 32 and accompanying text.

77. In many cases, courts dismiss prisoner pleadings based on the failure of the prisoner to set out or adequately explain his claims and the court does not engage in an effort to create claims of relief for the plaintiff or to try to help the plaintiff in setting out his claims. *See, e.g.,* *Richards v. Johnson*, 115 F. App'x 677 (5th Cir. 2004) (dismissing complaint where there was lack of specificity in claims and defendants); *McDonald v. Hall*, 610 F.2d 16 (1st Cir. 1979) (stating "[o]ur duty to be 'less stringent' with pro se complaints does not require us to conjure up unpled allegations").

78. In other cases, the courts appear to be more liberal in finding claims that may go forward in a § 1983 action. *See, e.g.,* *Dillier v. Williams*, No. 93-56380, 1994 WL 10005, at *1-2 (9th Cir. Jan. 13, 1994) (applying liberal pleading standard to inartful complaint, court found district court erred in dismissal of complaint); *Roundtree v. N.Y. Dep't of Corr.*, No. CV-94-3833 (CPS), 1995 WL 428654, at *5 (E.D.N.Y. July 1, 1995) (noting that although inartfully pled, the plaintiff nonetheless stated a claim with respect to constitutional deprivation due to prison transfer decision); *see also* *Marshall v. Brierley*, 461 F.2d 929, 930 (3rd Cir. 1972) (reviewing complaint filed by a prisoner with "only minimal literary skills" and finding sufficient grounds to allow complaint to go forward).

79. *See, e.g.,* *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994) ("Because Burgos is a pro

This type of construction seemed reasonable prior to 1996 and consistent with the judiciary's commitment to fairness and the elevation of substance over form. However, this liberal construction practice ultimately collided with the PLRA exhaustion requirement.⁸⁰ Indeed, with the passage of the PLRA, a court's commitment to generous construction often proved unfair to the very people it intended to help.

For example, until recently, some courts "generously" read legal claims into complaints only to dismiss the entire action if the plaintiff failed to exhaust even a single theory.⁸¹ The anomaly was that the theory might have been unexhausted only because the pro se litigant had not intended to assert it in the litigation as a separate cause of action. Benign in purpose, proactive construction of pro se complaints has proved far from benign in result.

The same has often been true even in those courts that decline to dismiss the entire action when some of the claims were exhausted and some were not.⁸² In addition to requiring administrative exhaustion, Congress intensified the requirements for pauper status for prisoners who had filed baseless lawsuits.⁸³ Congress did so by treating dismissals for "frivolousness" or "failure to state a valid claim" as "strikes."⁸⁴ A prisoner could accumulate three "strikes" without a penalty, but once the inmate obtained three "strikes," he could only gain pauper status upon a showing that he was in imminent risk of serious bodily harm.⁸⁵

With the statutory change, courts have struggled to determine when a "strike" has taken place.⁸⁶ Some courts conclude that a "strike" occurs when a trial court

se litigant, we read his supporting papers liberally, and will interpret them to raise the strongest arguments that they suggest."); *White v. Wyrick*, 530 F.2d 818, 819 (8th Cir. 1976) (per curiam) ("[W]e note that petitioner appears pro se and is entitled to have his pleadings interpreted liberally and his petition should be construed to encompass any allegation stating federal relief . . .").

80. The exhaustion requirement can be found at 42 U.S.C. § 1997e(a) (2000).

81. *See, e.g., Patel v. Fleming*, 415 F.3d 1105, 1109-11 (10th Cir. 2005) (dismissing prisoner's pro se complaint for failure to timely submit a written administrative remedy request even though plaintiff claimed he was late in submitting because of an attempt to intentionally resolve his second hand smoke damages); *Bey v. Johnson*, 2005 FED App. 0194P, 407 F.3d 801, 805-07 (6th Cir. 2005) (adopting the "total exhaustion rule" so that any and all available remedies must have been exhausted before a prisoner could bring any claims that were even remotely connected to potential administrative remedies), *vacated and remanded by* 127 S. Ct. 1212 (2007); *Graves v. Norris*, 218 F.3d 884, 885-86 (8th Cir. 2000) (per curiam) (dismissing the claim because "it is clear from the record that at least some of plaintiffs claims were unexhausted"). The Supreme Court ultimately rejected this approach. *Jones v. Bock*, 549 U.S. 199, 219 (2007) (concluding that "exhaustion is not *per se* inadequate [L]eav[ing] it to the court below in the first instance to determine the sufficiency of the exhaustion in these cases").

82. *E.g., Ortiz v. McBride*, 380 F.3d 649, 651 (2d Cir. 2004) (observing Second Circuit conclusion that complete dismissal is not required under § 1997e).

83. Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(g) (2000).

84. *Id.*

85. *Id.*

86. *See, e.g., Dubuc v. Johnson*, 314 F.3d 1205, 1209 (10th Cir. 2003) (discussing "the irony

dismisses even a single cause of action for frivolousness or failure to state a valid claim.⁸⁷ In these courts, deciphering a pro se party's complaint can often create hidden consequences extending far beyond the case itself. For example, a pro se party could, hypothetically, assert five claims, prevail on four, and suffer dismissal of one. The lone dismissal could forever jeopardize pauper status for the litigant even though he had prevailed in the suit. In these circumstances, the pro se litigant would suffer even without a hint of having abused his pauper status.

The danger is heightened by the treacherous task of deciding which claims were intended by the plaintiff and which were not. In the hypothetical situation, the pro se litigant might never have intended to assert the single cause of action that was dismissed. The courts, benign in purpose, might be forever penalizing the same litigants who were the intended beneficiaries of such judicial generosity.

D. The AEDPA's Impact on Judicial Construction of Pro Se Petitions

In 1996, Congress set out to limit habeas litigation.⁸⁸ Prior to 1996, federal

that ascertaining whether a particular prisoner litigant has accumulated at least three strikes may require the use of more judicial resources than addressing the prisoner's claims on the merits").

87. See *Pointer v. Wilkinson*, 2007 FED App. 0363P, at 7, 502 F.3d 369, 377 (6th Cir. 2007) ("[W]e hold that where a complaint is dismissed in part without prejudice for failure to exhaust administrative remedies and in part with prejudice because 'it is frivolous, malicious, or fails to state a claim upon which relief may be granted,' the dismissal should be counted as a strike under 28 U.S.C. § 1915(g)."); *Comeaux v. Cockrell*, 72 F. App'x 54, 55 (5th Cir. 2003) (per curiam) ("The district court could dismiss part of [the plaintiff's] complaint as malicious, which counted as a strike under 28 U.S.C. § 1915(g), even though the case was ultimately dismissed for failure to comply with court orders."); *Faust v. Parke*, No. 96-3881, 1997 WL 284598, at *3 (7th Cir. May 22, 1997) (stating that a dismissal "counts as a strike" under § 1915(g), notwithstanding the court's decision not to retain jurisdiction over a constructive fraud claim); *Eady v. Lappin*, No. 9:05-CV-0824, 2007 WL 1531879, at *2 (N.D.N.Y. May 22, 2007) (adopting magistrate judge's finding that "a plaintiff might earn a strike because some of his claims were dismissed for frivolousness, maliciousness or failure to state a claim"); *Shaw v. Weak*s, No. 06-2024-B/V, 2006 WL 1049307, at *6 n.13 (W.D. Tenn. Apr. 20, 2006) ("The fact that some of plaintiff's claims in this action have been dismissed for failure to exhaust does not preclude the imposition of a strike on the basis of claims that were dismissed for failure to state a claim or as frivolous."); *Luedtke v. Bertrand*, 32 F. Supp. 2d 1074, 1076 n.1 (E.D. Wis. 1999) (holding that dismissal of a corresponding state law claim, without prejudice, based on a lack of federal subject-matter jurisdiction, "does not, and should not, disqualify the case from being counted as a 'strike' for purposes of § 1915(g)").

88. See Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. §§ 2244(d)(1)(A)-(D) (2000); see also *David v. Hall*, 318 F.3d 343, 346 (1st Cir. 2003) ("One of AEDPA's main purposes was to compel habeas petitions to be filed promptly after conviction and direct review, to limit the number, and to permit delayed or second petitions only in fairly narrow and explicitly defined circumstances."); *Miller v. N.J. Dep't of Corrs.*, 145 F.3d 616, 618 (3d Cir. 1998) (noting that Congress enacted AEDPA, "in relevant part to curb the abuse of the writ of habeas corpus").

courts could dismiss repetitious habeas filings on grounds that they involved an abuse of the writ.⁸⁹ Dismissal was generally not mandatory and courts had almost no guidance on how to exercise their discretion.⁹⁰ Through the AEDPA, Congress created a framework that left little room for successive habeas petitions and motions for vacatur of a sentence. One could only file a second or successive habeas petition or motion for vacatur of a sentence if he satisfied a narrow set of criteria and obtained advance authorization by the court of appeals.⁹¹

The result was an array of new legislative consequences when a prisoner had already filed a habeas petition or motion to vacate the sentence.⁹² However, prior to passage of the AEDPA, the courts had accumulated twenty-three years of precedent on when a pleading should be interpreted as a habeas petition or motion to vacate the sentence. With this precedent in place, passage of the 1996 statute created a reminder of the dangers in the judiciary's proactive reading of pro se pleadings.

The anomaly is largely rooted in *Preiser v. Rodriguez*⁹³ in which the Supreme Court held that a writ of habeas corpus constituted the exclusive remedy when one challenged the fact or duration of confinement.⁹⁴ When an inmate asserted such a challenge through other means, such as a civil rights action brought pursuant to 42 U.S.C. § 1983, courts faced a dilemma.⁹⁵ One alternative was to take the inmate's filing fee and dismiss the action without reaching the merits.⁹⁶

89. See 28 U.S.C. § 2244(a) (1994).

90. See *id.* § 2244(a)-(b); RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS R. 9(b) (as amended to Feb. 1, 1995); see also *Kramer v. Butler*, 845 F.2d 1291, 1295 (5th Cir. 1988) (“[W]hether a habeas petition is dismissed as an abuse of the writ under Rule 9(b) is to a large extent discretionary rather than automatic or mandatory.”) (citation omitted).

91. See 28 U.S.C. §§ 2244(b)(3), 2255 (2000).

92. See *id.*

93. 411 U.S. 475 (1973).

94. See *id.* at 503 (Brennan, J., dissenting) (stating that under the majority's holding “habeas corpus is now considered the prisoner's exclusive remedy”).

95. The reason for the dilemma is this: an inmate files a 1983 action and he pays his filing fee. Unfortunately, he should have filed a habeas petition and he cannot proceed on his claim under 1983. So, at this point, the court dismisses the 1983 action, and the prisoner loses the filing fee, and he does not get a hearing on his claim. To avoid this harsh result, the court could convert or recharacterize the claim as a habeas action, and the court could now go ahead and hear the merits of his claim. As the Supreme Court noted in *Castro v. United States*, 540 U.S. 375, 381 (2003), “[f]ederal courts sometimes will ignore the legal label that a [pro se] litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category.”

96. See *infra* notes 105-10 and accompanying text; see also *Spillman v. Cully*, No. 08-CV-008M, 2008 WL 495512 (W.D.N.Y. Feb. 15, 2008) (finding § 1983 complaint should be recharacterized as a habeas petition and notifying plaintiff of intent to do so unless plaintiff advises the court otherwise); *Brown v. Guiney*, No. 06-CV-555, 2006 WL 1144499 (W.D.N.Y. April 25, 2006) (same). For cases in which courts decline to recharacterize § 1983 complaints as habeas petitions, see *Clay v. Smith*, No. CIV-08-85-W, 2008 WL 4533993 (W.D. Okla. Oct. 2, 2008);

Some courts saw this alternative as incompatible with *Haines* and routinely recharacterized such actions as habeas petitions.⁹⁷ The process appears to supply courts with a fair means to reach the merits of the claim, recognizing the pro se litigant's difficulties and the guidance offered in *Haines*.

The problem was that these courts could not anticipate legislative changes which would turn this benign process of recharacterization into a dangerous penalty for pro se litigants. For example, the AEDPA requires courts to address whether an action is "second or successive" even when the proponent has sought habeas relief or vacatur of the sentence prior to enactment of the law.⁹⁸ Courts frequently answered in the affirmative.⁹⁹ Thus, when a court recharacterized an action prior to 1996 as a habeas petition or motion for vacatur of a sentence, the litigant now needed the appellate court's permission before he could file another habeas petition.¹⁰⁰ Under the statute, this permission was available only in narrow circumstances.¹⁰¹ Thus, recharacterization of pleadings frequently disadvantaged the same people that the courts had hoped to protect.

An example of the anomaly is the litigation brought by Sylvester Tolliver. In 1993, Mr. Tolliver was convicted of three criminal counts, including violation of 18 U.S.C. § 924(C)(1).¹⁰² Only days after enactment of the 1996 habeas law, Mr. Tolliver filed a motion to dismiss one of the counts on which he was convicted.¹⁰³ Even before the court ruled, Mr. Tolliver objected to characterization of the motion as one filed under 28 U.S.C. § 2255.¹⁰⁴

Foster v. Berghuis, No. 1:07-cv-950, 2008 WL 4426337 (W.D. Mich. Sept. 26, 2008); *Crow v. Quarterman*, No. G-07-0096, 2008 WL 3539738 (S.D. Tex. Aug. 13, 2008).

97. See, e.g., *Raineri v. United States*, 233 F.3d 96, 100 (1st Cir. 2000) (holding that "when a district court, acting sua sponte, converts a post-conviction motion filed under some other statute or rule into a section 2255 petition without notice and an opportunity to be heard . . . the recharacterized motion ordinarily will not count as a 'first' habeas petition sufficient to trigger AEDPA's gatekeeping requirements").

98. 28 U.S.C. § 2244(b) (2000).

99. E.g., *Cooper v. Calderon*, 274 F.3d 1270, 1272 (9th Cir. 2001) (per curiam); *Daniels v. United States*, 254 F.3d 1180, 1188 (10th Cir. 2001) (en banc); *Graham v. Johnson*, 168 F.3d 762, 781-83 (5th Cir. 1999); *In re Minarik*, 166 F.3d 591, 599-600 (3d Cir. 1999).

100. See *supra* notes 88-91 and accompanying text.

101. See 28 U.S.C. §§ 2244(b)(2), 2255 (2000).

102. Judgment in a Criminal Case, *United States v. Tolliver*, Case No. CR-92-20008-01 (W.D. La. Apr. 16, 1993).

103. Motion to Dismiss 18 U.S.C. 924(C), *Tolliver v. United States*, No. CR-92-20008-01 (W.D. La. May 20, 1996).

104. Mr. Tolliver wrote to the court clerk:

I'm writing in response to the Government's response to my *Motion to Dismiss 18 U.S.C. 924(C)1*. First, my motion wasn't suppose [sic] to be filed as a 2255 motion, because I sent a letter in dated 6-9-96 explaining that. So, please take this letter as an objection to my motion being filed under 28 U.S.C. 2255. Instead, this motion should be construed as a motion for a reduction of sentence Pursuant to 3582, *Not* a 2255. Also, I have other issues I plan to bring up in the future under Section 2255, and this

Nonetheless, the court treated the motion as one for vacatur of the sentence under 28 U.S.C. § 2255.¹⁰⁵ Mr. Tolliver later wanted to file a second motion under § 2255, and the federal appeals court denied leave.¹⁰⁶ In doing so, the court said that Mr. Tolliver could not file a second motion under § 2255 even though he had never intended to file one and his prior motion had addressed only one of three counts.¹⁰⁷ The federal appeals court reasoned that Mr. Tolliver's motion had to arise under § 2255 even though he called the document a "motion to dismiss."¹⁰⁸

The court's effort to help Mr. Tolliver did him little good. If the document had been treated as a motion to dismiss, the court presumably would have denied relief.¹⁰⁹ However, such treatment would have allowed refileing of the motion under its proper label, with inclusion of all grounds and counts that Mr. Tolliver wanted to address. The result, instead, involved an anomaly. As the First Circuit put it, by "striv[ing] to balance the scales of justice" through recharacterization, the court "preclud[ed] the pleader from any opportunity to litigate potentially meritorious constitutional claims."¹¹⁰

Haines v. Kerner did not create the anomaly. Instead, the anomaly arose from the courts' use of *Haines* as an equalizer in the litigation. The courts hoped not only to remove legal obstacles for inmates, but also to give them the benefit of strategic choices that presumably would have been made with legal representation.¹¹¹ One could only guess whether these predictions would have

motion has been used by several inmates and this is the first time it has been interpreted as a 2255, so please don't file it as such.

Letter from S. Tolliver to Court Clerk, *United States v. Tolliver*, No. CR-92-20008-01 (docketed July 15, 1996).

105. Judgment in a Criminal Case, *United States v. Tolliver*, Case No. CR-92-20008-01 (W.D. La. July 8, 1996).

106. *In re Tolliver*, 97 F.3d 89, 90 (5th Cir. 1996) (per curiam).

107. *Id.*; see *supra* notes 82-85 and accompanying text (discussing the three strikes rule as strictly applied).

108. *In re Tolliver*, 97 F.3d at 90.

109. See *Carlson Mktg. Group, Inc. v. Royal Indem. Co.*, No. 04-CV-3368, 2006 WL 2917173, at *2-3 (D. Minn. Oct. 11, 2006) (stating that motions to strike documents, other than pleadings, would be denied because "there is no such thing"); *Zurich Am. Ins. Co. v. Pillsbury Co.*, 264 F. Supp. 2d 710, 711 (N.D. Ill. 2003) (denying a motion to dismiss under the specified state statute, as "[t]here is no such thing" under federal procedural law).

110. *Raineri v. United States*, 233 F.3d 96, 99 (1st Cir. 2000).

111. For example, although a pro se plaintiff may not know the correct language or style of a claim for relief that a lawyer would use, the court will construe the complaint so as to allow the complaint to go forward. *Marshall v. Brierley*, 461 F.2d 929, 930 (3rd Cir. 1972) (court reviewed complaint filed by a prisoner with "only minimal literary skills" and found sufficient grounds to allow complaint to go forward). Likewise in recharacterizing 1983 actions as habeas proceedings and advising the plaintiff of this action, the court is directing the plaintiff towards the correct legal action to pursue. See, e.g., *Spillman v. Cully*, No. 08-CV-008M, 2008 WL 495512 (W.D.N.Y. Feb. 15, 2008); *Brown v. Guiney*, No. 06-CV-55S, 2006 WL 1144499 (W.D.N.Y. April 25, 2006) (both finding § 1983 complaint should be recharacterized as a habeas petition and notifying plaintiff of

materialized if the inmates had been represented.

As a result, courts used assumptions to make their guesswork as meaningful as possible. Prior to 1996, the assumptions could help inmates, but not harm them.¹¹² Adoption of the AEDPA changed that legal landscape.¹¹³ If courts had not sought to level the playing field, many pro se litigants would have been able to file future habeas petitions or motions to vacate a sentence without the need for judicial permission.¹¹⁴ With the new legal consequences created by Congress, the judiciary's proactive effort to help pro se litigants created an unwanted, undeserved burden for them.¹¹⁵

The inequity is traceable to the judiciary's process of treating pleadings

intent to do so unless plaintiff advises the court otherwise).

112. The reason it could not harm them is that the second and successive rules of habeas petitions were different pre-AEDPA and the plaintiffs would not have been adversely affected under the old rules. The consequences of the change in habeas rules in the AEDPA are discussed in *Castro v. United States*, 540 U.S. 375, 377 (2003), in which the Supreme Court stated:

Under a longstanding practice, a court sometimes treats as a request for habeas relief under 28 U.S.C. § 2255 a motion that a [pro se] federal prisoner has labeled differently. Such recharacterization can have serious consequences for the prisoner, for it subjects any subsequent motion under § 2255 to the restrictive conditions that federal law imposes upon a "second or successive" (but not upon a first) federal habeas motion. § 2255, ¶ 8. In light of these consequences, we hold that the court cannot so recharacterize a [pro se] litigant's motion as the litigant's first § 2255 motion *unless* the court informs the litigant of its intent to recharacterize, warns the litigant that the recharacterization will subject subsequent § 2255 motions to the law's "second or successive" restrictions, and provides the litigant with an opportunity to withdraw, or to amend, the filing. Where these things are not done, a recharacterized motion will not count as a § 2255 motion for purposes of applying § 2255's "second or successive" provision.

Id. As a result, when a court now wishes to recharacterize a complaint as a petition, it must advise the plaintiff. Unfortunately, this requirement does not help plaintiffs whose complaints were recharacterized prior to *Castro*.

113. See *United States v. Palmer*, 296 F.3d 1135, 1144 (D.C. Cir. 2002) ("The AEDPA significantly changed the landscape.").

114. See generally *Castro*, 540 U.S. 375.

115. The Second Circuit Court of Appeals explained:

[A] conversion, initially justified because it harmlessly assisted the prisoner-movant in dealing with legal technicalities, may result in a disastrous deprivation of a future opportunity to have a well-justified grievance adjudicated. The court's act of conversion which we approved under pre-AEDPA law because it was useful and harmless might, under AEDPA's new law, become extraordinarily harmful to a prisoner's rights. A prisoner convicted pursuant to unconstitutional proceedings might lose the right to have a single petition for habeas corpus adjudicated, solely by reason of a district court's having incorrectly recharacterized some prior motion as one brought under § 2255.

Adams v. United States, 155 F.3d 582, 583-84 (2d Cir. 1998) (per curiam) (footnote omitted).

based on what would have benefitted the pro se litigant rather than what he or she had actually intended. This methodology is traditionally aligned with advocacy rather than adjudication.¹¹⁶

Courts have struggled to avoid this inequity in various ways. For example, the Supreme Court has prohibited recharacterization of a pleading as an initial motion under 28 U.S.C. § 2255 in the absence of disclosure regarding the district court's intent.¹¹⁷ The Court warned that recharacterization could render a subsequent motion "second or successive," so the litigant must be provided an opportunity to withdraw or to amend the filing.¹¹⁸ Many courts have applied the same principle to disclosures and warnings to the litigant whenever a pleading is recharacterized as an initial habeas petition.¹¹⁹ This practice avoids the anomaly for prisoners, like Mr. Tolliver, whose motions are recharacterized to their detriment. However, this practice further compromises the judiciary's role as an impartial arbiter, as the court becomes a counselor for the litigant and gives him an opportunity to amend or withdraw a pleading without any basis in either the Federal Rules of Civil or Criminal Procedure.¹²⁰

When the district court fails to give the required warnings, a subsequent pleading will not be considered a "second or successive" motion under 28 U.S.C. § 2255.¹²¹ This approach effectively disregards the congressional will for consideration of certain pleadings as second or successive.¹²²

116. Compare AMERICAN HERITAGE DICTIONARY 26 (4th ed. 2000) (defining "advocacy" as "[t]he act of pleading or arguing in favor of something, such as a cause, idea, or policy; active support"), with *id.* at 25 (defining "adjudicate" as "[t]o hear and settle (a case) by judicial procedure").

117. *Castro*, 540 U.S. at 383.

118. *Id.* (discussing the implications of a district court's characterization in light of 28 U.S.C. 2255 (2006)).

119. See, e.g., *Yellowbear v. Wyo. Attorney Gen.*, 525 F.3d 921, 924-25 (10th Cir. 2008) (requiring the *Castro* warnings before recharacterization as a habeas petition brought under 28 U.S.C. § 2254); *Martin v. Overton*, 2004 FED App. 0413P, 391 F.3d 710, 712-13 (6th Cir. 2004) (requiring disclosure and consent before the court can sua sponte convert a pleading to a habeas petition brought under 28 U.S.C. § 2254 (2000)); *Simon v. United States*, 359 F.3d 139, 145 (2d Cir. 2004) (requiring the same disclosure and warnings when a motion is converted to a habeas petition under 28 U.S.C. § 2241).

120. See FED. R. CIV. P. 15(a)(2) and 41(a)(2) (requiring court approval for amendments and voluntary dismissals in certain situations). Cf. RULES GOVERNING SECTION 2255 PROCEEDINGS IN THE UNITED STATES DISTRICT COURTS R. 12 (stating that the Federal Rules of Civil and Criminal Procedure may be applied in actions involving 28 U.S.C. § 2255). The Supreme Court's procedure implicitly requires the district court to permit amendment or dismissal whenever a pleading is recharacterized as an initial motion under Section 2255. *Castro*, 540 U.S. at 303 (noting that the district court should "provide the litigant the opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has").

121. *Castro*, 540 U.S. at 377.

122. See *United States v. Ceballos-Martinez*, 387 F.3d 1140, 1145 (10th Cir. 2004) (stating that the Tenth Circuit had never interpreted principles of liberal construction for pro se litigants to

A pleading is whatever it is, regardless of what the court does. The legislative consequences for the pleader should not depend on whether the judge decides to leave the pleading alone or treat it as something other than what the proponent said it was. With injection of the judge's action into a determination of legislative consequences, the judicial role changes from umpire to advocate. And with this change comes the unfortunate loss of the judge's neutrality.

III. THE LESSONS LEARNED FROM THE PLRA AND AEDPA

With this intangible loss of a judge's neutrality, the courts may be creating unintended penalties for the litigants who the courts are paradoxically trying to help. The 1996 changes in the PLRA¹²³ and AEDPA¹²⁴ illustrate these dangers. The 1996 amendments governing pauper status,¹²⁵ exhaustion of administrative remedies,¹²⁶ and second and successive habeas petitions and motions under 28 U.S.C. § 2255¹²⁷ created new consequences for prior recipients of judicial paternalism. In bestowing these acts of paternalism, the courts may not have foreseen the changes ultimately taking place in 1996. Moreover, the courts currently engaging in judicial paternalism may not foresee future changes.

There is no definitive solution to the minefield of potential problems wrought by benevolence for pro se litigants. The futility is seen in the courts' current efforts to alleviate these problems through the invention of a requirement for warnings or a unilateral determination about the fairness of treating a petition or motion as second or successive once another court has engaged in recharacterization.¹²⁸

The minefield of dilemmas results from the slippage in the courts' appreciation for the adversarial system. As the arbiters of the system, judges often view the ultimate objective as fairness.¹²⁹ The difficulty arises, however, from an occasional failure to distinguish between fairness of the process and fairness of individual results.¹³⁰ As judges frequently recognize, a pro se litigant

ignore "congressionally established procedural rules").

123. See *supra* Part II.C.

124. See *supra* Part II.D.

125. See Prison Litigation Reform Act of 1995, 28 U.S.C. § 1915(g) (2000).

126. See Prison Litigation Reform Act of 1995, 42 U.S.C. § 1915e(a) (2000).

127. See Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2244(b) (2000).

128. See, e.g., *United States v. Castro*, 540 U.S. 375 (2003).

129. See Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1643, 1646 (1985) [hereinafter Newman, *Rethinking Fairness*] ("Fairness is the fundamental concept that guides our thinking [as Judges] about substantive and procedural law.").

130. See, e.g., Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 515 (2002) ("[C]ourts and commentators are thus coming to recognize the authority, if not the responsibility, of a judge to depart from the ethical norms of adversarial justice in order to ensure a fair and accurate result and, in particular, to take an activist stance in cases involving unrepresented litigants."); Newman, *Rethinking Fairness*, *supra* note 129, at 1649 ("[A]lthough we scrupulously strive to achieve a fair

ordinarily lacks the knowledge and ability of his opposing attorney.¹³¹ However, even when both sides are represented, the attorneys are often unequal in ability,¹³² just as some witnesses, clients, and jurors are better than others.¹³³ As one federal appellate judge remarked:

Trials are not clinical investigations, performed under laboratory conditions. They are human confrontations, subject to all the normal risks of human error and with the risks compounded by the dramatic intensity of the event, the contentiousness of the adversary process, and the distortions that sometimes arise from disparity in talent and resources of the contending sides.¹³⁴

The effort to equalize adversarial ability is a futile endeavor, but the hopelessness of the task is not the greatest danger. Instead, the greater danger is the loosening of the well-designed constraints on the role of the judiciary in the adversarial process. Judges are not advocates or advisors. When judges adopt these roles, they violate deeply embedded legal principles. For example, advocacy runs afoul of the judge's duty of impartiality.¹³⁵ Additionally, giving legal advice is prohibited by multiple canons of judicial conduct.¹³⁶ Finally,

outcome in the individual dispute, we rarely consider how to be fair to all who use or would like to use the litigation system.”).

131. See *supra* note 32 and accompanying text.

132. The Ninth Circuit Court of Appeals urged equal treatment for pro se litigants in ordinary civil cases, stating, “Trial courts generally do not intervene to save litigants from their choice of counsel, even when the lawyer loses the case because he fails to file opposing papers. A litigant who chooses *himself* as legal representative should be treated no differently.” *Jacobsen v. Filler*, 790 F.2d 1362, 1364–65 (9th Cir. 1986) (footnote omitted).

133. See Michael L. Moffitt, *Customized Litigation: The Case for Making Civil Procedure Negotiable*, 75 GEO. WASH. L. REV. 461, 521 (2007) (“[T]he reality on the ground is that, even today, no two trials look exactly alike, not only because the particular facts of the dispute are different, but also because some degree of customization already happens.”).

134. Newman, *Rethinking Fairness*, *supra* note 129, at 1648.

135. See *Pruitt v. Mote*, 503 F.3d 647, 664 (7th Cir. 2007) (“[A] judge is constrained by a duty of impartiality, and whatever he might do to help an unrepresented litigant, he cannot be that individual’s advocate.”); see also MODEL CODE OF JUDICIAL CONDUCT Canon 2 (2007) (“A judge shall perform the duties of judicial office impartially, competently, and diligently.”).

136. Judges are prohibited from practicing law. MODEL CODE OF JUDICIAL CONDUCT R. 3.10 (2007) (“A judge shall not practice law.”); CODE OF CONDUCT FOR UNITED STATES JUDGES Canon 5(F) (“A judge should not practice law.”). Giving legal advice is a basic characteristic of legal practice, as the Supreme Court noted: “Explaining the details of federal habeas procedure and calculating statutes of limitations are tasks normally and properly performed by trained counsel as a matter of course. Requiring district courts to advise a [pro se] litigant in such a manner would undermine district judges’ role as impartial decisionmakers.” *Pliler v. Ford*, 542 U.S. 225, 231 (2004); see also *In re Reynoso*, 477 F.3d 1117, 1125 (9th Cir. 2007) (remarking that under state law, the practice of law generally includes “legal advice”). Thus, a judge cannot ethically give legal advice to any of the parties, regardless of whether they are pro se. See Engler, *supra* note 48, at

warnings to litigants closely resemble the sort of “advisory opinions” prohibited in Article III of the United States Constitution.¹³⁷

The courts’ attempts to advocate, counsel, and warn stem from an admirable objective—fairness. But the judge’s role in our system is to ensure fairness of the process rather than fairness to an individual case.¹³⁸ Otherwise, the judge’s task is one of futility because endless inequities exist in any case.

IV. PROPER INTERPRETATION AND THE DIMINISHED IMPORTANCE OF *HAINES V. KERNER*

To reverse the thirty-six year distortion of *Haines*, courts must understand the source. Many courts have afforded special treatment to equalize the legal resources available to litigants.¹³⁹ Equalization of resources would require participation of the judge as an advocate and advisor.¹⁴⁰ With this loss in neutrality, courts risk unintended problems for pro se litigants and the assumption of legislative roles.¹⁴¹

The key to construction of pro se pleadings involves an understanding of what the litigant has said.¹⁴² When a litigant is unrepresented, he may be unable

1988 (“The rules primarily prohibit . . . court players from giving legal advice to unrepresented litigants.”).

137. See *Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (“It is . . . familiar learning that no justiciable ‘controversy’ exists when parties . . . ask for an advisory opinion”) (citation omitted); see also *Asahi Glass Co. v. Pentech Pharms., Inc.*, 289 F. Supp. 2d 986, 989-90 (N.D. Ill. 2003) (noting that federal courts cannot issue advisory opinions and that “judges are not authorized to issue legal advice”).

138. One commentator explains:

Justice is blind and employs scales to ensure procedural fairness, an ideal fundamental to the Constitution’s due process tradition. Procedure constrains judicial sight and provides criteria of relevance for what kinds of things Justitia might properly see. Like the mechanics of paired scales, procedure provides the mechanics for fair outcomes through the blind weighing of competing claims.

Thomas P. Crocker, *Envisioning the Constitution*, 57 AM. U. L. REV. 1, 27 (2007).

139. For example, in 2007, the American Bar Association approved a comment to accompany the *Model Code of Judicial Conduct*, which would allow judges “to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.” MODEL CODE OF JUDICIAL CONDUCT R. 2.2 cmt. 4 (2007). The *Reporter’s Explanation of Changes* noted that the comment was designed to “level[] the playing field” by ensuring a “fair hearing” but not “an unfair advantage” for pro se litigants. MODEL CODE OF JUDICIAL CONDUCT R. 2.2, reporter’s explanation of changes cmt. 4 (2007), available at www.abanet.org/judiciaethics/mcjc-2007.pdf.

140. See *supra* note 116 and accompanying text.

141. See *supra* notes 112-17 and accompanying text.

142. See *Laber v. Harvey*, 438 F.3d 404, 413 n.3 (4th Cir. 2006) (“In interpreting a pro se complaint, . . . our task is not to discern the unexpressed intent of the plaintiff, but what the words in the complaint mean.”).

to clearly express himself to a court. As a result, *Haines* required the courts to show some flexibility in their interpretation of a pro se litigant's pleadings.¹⁴³

Courts have ample resources available to determine the pro se party's intent. For example, in the Fifth Circuit, courts conduct *Spears* hearings¹⁴⁴ to assist in screening prisoner complaints for frivolousness or failure to state a valid claim.¹⁴⁵ These proceedings can easily be modified to permit the judge to inquire into the pleader's intent.

Once the court learns the pleader's intent, the task of interpretation is complete. Further steps to help the pro se litigant involve advocacy and counsel rather than interpretation. Such steps are, therefore, inappropriate.

CONCLUSION

The morass of approaches to pro se litigation reflects a long-standing ambivalence over pleading standards and the judge's role in the adversarial process. As pleading standards softened, courts struggled with how to address fanciful suits brought by unrepresented parties. With this internal struggle, judges understandably hoped to relieve pro se litigants of endless procedural traps when the underlying claims appeared meritorious. In this setting, the Supreme Court innocuously noted the claimant's pro se status in *Haines v. Kerner*, and lower courts set out to use this phrase to vindicate an infinite set of views about how to assess pleading standards and how to help unrepresented parties navigate various procedural traps. These efforts proved not only futile, but also counter-productive. In the process, the courts compromised their own neutrality and limited role.

The recent sharpening of pleading standards should relieve judges of these conflicts. Judges no longer enjoy open license to devise their own ways of dealing with implausible suits by pro se litigants. The inevitable and long-overdue result is the judiciary's return to its traditional function as the neutral

143. *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (noting that pro se complaints are held to "less stringent standards than formal pleadings drafted by lawyers").

144. So named because the hearings were established in *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985), *abrogated by* *Nietzke v. Williams*, 490 U.S. 319 (1989).

145. An example of the procedure is reflected in *Davis v. Scott*, 157 F.3d 1003 (5th Cir. 1998). There the appeals court held that the magistrate judge had acted within his discretion in developing and ultimately dismissing a prisoner's Eighth Amendment claims. *Id.* at 1005. The Fifth Circuit Court of Appeals went on to explain:

This is quite a different thing from saying that the magistrate judge has a duty to interrogate the pro se plaintiff in such a way as to exhaust conceivable causes of action. The magistrate judge has no such duty. Instead, the *Spears* procedure affords the plaintiff an opportunity to verbalize his complaints, in a manner of communication more comfortable to many prisoners. But the plaintiff remains the master of his complaint and is, in the end, the person responsible for articulating the facts that give rise to a cognizable claim.

Id. at 1005-06.

arbiter of fairness in the litigation process. Like everyone else, some pro se litigants will achieve fair results and others will not, but equality in treatment will at least ensure fairness in the process for everyone.

A NEPA CLIMATE PARADOX: TAKING GREENHOUSE GASES INTO ACCOUNT IN THRESHOLD SIGNIFICANCE DETERMINATIONS

MADELINE JUNE KASS*

INTRODUCTION

The looming prospect of unprecedented, unrestrained global climate change has taken hold of the national consciousness as a crisis of epic proportion. In April 2008, the following declaration set the tone for a Time Magazine cover article: “The steady deterioration of the very climate of our very planet is becoming a war of the first order, and by any measure, the U.S. is losing. Indeed, if we’re fighting at all—and by most accounts, we’re not—we’re fighting on the wrong side.”¹ Perhaps a bit glibly, but reflecting rising and widespread attention to climate change concerns by the U.S. cultural mainstream, it has also been said that “[p]eople are beginning to think about their carbon footprint almost as much as their cholesterol level.”² More gravely, former Vice President Gore—a longtime advocate for climate protection—stated in his Nobel Peace Prize acceptance speech that “[w]e, the human species, are confronting a planetary emergency—a threat to the survival of our civilization that is gathering ominous and destructive potential.”³ Despite these dire warnings, scientific research released in the fall of 2008 indicates carbon and other greenhouse gas (GHG) emissions are rising *even faster* than previously anticipated.⁴

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1. Bryan Walsh, *How to Win the War on Global Warming: Why Green Is the New Red, White, and Blue*, TIME MAGAZINE, Apr. 28, 2008, at 45.

2. Steven Burns, *Environmental Policy and Politics: Trends in Public Debate*, 23 NAT. RESOURCES & ENV'T 8 (Fall 2008).

3. Albert Gore, Former Vice-President, 2007 Nobel Lecture at Oslo, Norway (Dec. 10, 2007) (transcript available at http://nobelprize.org/nobel_prizes/peace/laureates/2007/gore-lecture_en.html).

4. According to updated research by the Global Carbon Project (an institution supported by the International Council for Science, that acts as the umbrella body for all national academies of science), “Anthropogenic CO₂ emissions have been growing about four times faster since 2000 than during the previous decade” GLOBAL CARBON PROJECT (2008): CARBON BUDGET AND TRENDS 2007, http://www.globalcarbonproject.org/carbontrends/index_new.htm. Reporting on the findings, the Washington Post stated, “The rise in global carbon dioxide emissions last year outpaced international researchers’ most dire projections.” Juliet Eilperin, *Carbon Is Building up in Atmosphere Faster than Predicted*, WASH. POST, Sept. 26, 2008, at A02. “This output is at the very high end of scenarios outlined by the Intergovernmental Panel on Climate Change (IPCC) and could translate into a global temperature rise of more than 11 degrees Fahrenheit by the end of the century. . . .” *Id.* At the same time, the IPCC has previously “warned that an increase of between

Given the very serious threats global climate change pose to the human environment and a rising tide of public concern, climate seems both an appropriate and obvious subject for consideration under the National Environmental Policy Act of 1969 (NEPA).⁵ In fact, it would seem to be a “no-brainer.” Over a decade ago, the Council on Environmental Quality (CEQ)⁶ drafted guidance that found climate change reasonably foreseeable and an appropriate subject for NEPA assessment.⁷ Likewise, none of the federal courts hearing NEPA climate-related challenges have expressed doubt that global warming presents a proper subject for analysis under NEPA (although some have ruled against NEPA impact statement preparation on other grounds).⁸

3.2 and 9.7 degrees Fahrenheit could trigger massive environmental changes, including major melting of the Greenland ice sheet, the Himalayan-Tibetan glaciers and summer sea ice in the Arctic.” *Id.*

EPA data released in 2008 shows that total U.S. GHG emissions increased 14.7% from 1990 to 2006, while carbon dioxide emissions increased 19.3% over the same period. U.S. ENVTL. PROT. AGENCY, EXECUTIVE SUMMARY INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2006, at ES-4, ES-7 (April 2008), *available at* http://www.epa.gov/climatechange/emissions/downloads/08_ES.pdf [hereinafter U.S. ENVTL. PROT. AGENCY, EXECUTIVE SUMMARY].

5. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370f (2000 & Supp. 2005).

6. NEPA establishes the Council on Environmental Quality (CEQ) in the Executive Office of the President to oversee the Act’s implementation, to advise the President on the state of the environment, and to make recommendations for achieving NEPA’s goals. *Id.* §§ 4342, 4344. In this capacity, CEQ has promulgated detailed regulations and issued numerous regulatory guidance documents. *See generally* 40 C.F.R. ch. V (2008).

7. *See* Draft Memorandum from Kathleen McGinty, Chairman of Council on Env’tl. Quality, to all Federal Agency NEPA Liaisons (Oct. 8, 1997), *available at* <http://www.mms.gov/eppd/compliance/reports/ceqmemo.pdf> [hereinafter McGinty Memorandum]. According to CEQ’s draft memorandum, climate is not only an appropriate consideration under NEPA, but “[t]he NEPA process provides an excellent mechanism for consideration of ideas related to global climate change.” *Id.* at 1. Interestingly, CEQ never formally published the 1997 climate change guidance, which came to public attention only after being released and posted on the internet by another federal agency, the Minerals and Mining Service (MMS). *See* Memorandum from Nicholas Yost, former General Counsel CEQ, to Madeline J. Kass (Sept. 23, 2008) (on file with author).

Additionally, other CEQ guidance, which actually did issue in 1997, acknowledged climate change and GHG emissions as appropriate considerations of NEPA analysis. COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 7, 38 (1997) [hereinafter COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS]. For example, this CEQ guidance document states: “Direct effects continue to be most important to decisionmakers, in part because they are more certain. Nonetheless, the importance of . . . climate change, and other cumulative effects problems has resulted in many efforts to undertake and improve the analysis of cumulative effects.” *Id.* at 7 (emphasis added).

8. *See* Michael B. Gerrard, *Climate Change and the Environmental Impact Review Process*, 22 NAT. RESOURCES & ENV’T 20, 20-21 (Winter 2008) [hereinafter Gerrard, *Climate Change*]. Of the half dozen NEPA climate challenges to date, no federal court has ruled climate to be an

Yet, the fact that NEPA's relevance to the problem of climate change has legal grounding and common sense appeal does not make its application simple. Starting with the assumption that NEPA should and does extend to climate concerns, this Article examines some of the muddled, messy, and complicated aspects of actually integrating climate considerations into NEPA's procedural framework. Additionally, it offers some suggestions as to how to accomplish integration.⁹

I. THE NEPA CLIMATE CONNECTION

Described as an "environmental Magna Carta,"¹⁰ Congress enacted NEPA

inappropriate factor for NEPA consideration. *See* *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 508 F.3d 508, 552-58 (9th Cir. 2007) (discussing the need to prepare on environmental impact statement (EIS)), *vacated and superseded on denial of reh'g* by 538 F.3d 1172 (9th Cir. 2008) (modifying earlier decision in part only); *Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545, 554-56 (8th Cir. 2006) (noting that air emissions from coal are not an inappropriate factor for NEPA consideration); *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 549-50 (8th Cir. 2003) (noting that carbon dioxide levels in the air are not an inappropriate NEPA consideration); *City of L.A. v. Nat'l Highway Traffic Safety Admin.*, 912 F.2d 478 (D.C. Cir. 1990) (noting that global warming is an appropriate subject for NEPA EIS consideration), *overruled on other grounds* by *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996); *Friends of the Earth, Inc. v. Mosbacher*, 488 F. Supp. 2d 889, 963-65 (N.D. Cal. 2007) (discussing NEPA requirements and not expressing doubt as to appropriateness of climate change as a NEPA EIS factor); *Border Power Plant Working Group v. Dep't of Energy*, 260 F. Supp. 2d 997 (S.D. Cal. 2003) (discussing air pollutants as appropriate NEPA consideration).

State authorities have reached similar conclusions with respect to consideration of climate change pursuant to state environmental assessment laws (little NEPAs). *See generally* Michael B. Gerrard, *SEQRA and Climate Change*, 10 N.Y. ST. B.A. GOV'T LAW & POL'Y J. 68 (Summer 2008) (discussing authority of the New York State Department of Environmental Conservation to require consideration of climate change in EISs and that climate is already being considered in EISs by some lead agencies). For an alternative perspective, see Dave Owen, *Climate Change and Environmental Assessment Law*, 33 COLUM. J. ENVTL. L. 57, 96-118 (2008) (concluding that environmental assessment laws should play a role in addressing climate change but identifying various arguments against so doing).

9. This Article primarily focuses on applying NEPA's existing statutory framework to address climate change. For some recommendations on reforming NEPA to meet this challenge, see generally Lauren Giles Wishnie, Student Article, *NEPA for a New Century: Climate Change & the Reform of the National Environmental Policy Act*, 16 N.Y.U. ENVTL. L.J. 628 (2008).

10. Daniel R. Mandelker, *NEPA Law and Litigation* (West) § 1:1 (2008); *see also* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 904 (2002) ("The National Environmental Policy Act (NEPA) of 1969, the statute that launched the 'environmental decade' of the 1970s, has been hailed as one of the nation's most important environmental laws. It has also been condemned with equal vigor on grounds that it imposes costly, dilatory, and pointless paper-shuffling requirements on federal agencies and, indirectly, on private parties." (footnote omitted)).

in 1969 in part to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation.”¹¹ Towards these ends, NEPA calls for the preparation of a detailed analysis, known as an Environmental Impact Statement (EIS), for proposed legislative and major federal agency actions¹² “significantly affecting the quality of the human environment.”¹³ The EIS must include discussion of

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.¹⁴

The NEPA review process ideally serves an informational role¹⁵ by encouraging informed federal decisionmaking¹⁶ and promoting public awareness.¹⁷ Secondary benefits include fostering collaborative government¹⁸

11. 42 U.S.C. § 4321 (2000).

12. Subject “actions” include Federal agency projects, programs, and regulations as well as approvals, issuance of permits to, and funding of private (non-federal) actions. *See* 40 C.F.R. §§ 1508.4, 1508.18(a)-(b) (2008).

13. 42 U.S.C. § 4332(2)(C) (2000). Accordingly, NEPA’s implementing regulations mandate that federal agencies address the reasonably foreseeable environmental impacts of their proposed programs, projects, and regulations. *See* 40 C.F.R. § 1502.4 (2008); *see also id.* §§ 1508.8, 1508.18, 1508.25.

14. 42 U.S.C. § 4332(2)(C)(i)-(v) (2000); *see also* 40 C.F.R. pt. 1502 (2008).

15. For a detailed discussion of such role, *see* Wishnie, *supra* note 9, at 631-38.

16. *See* 40 C.F.R. § 1500.1(b) (2008) (stating that environmental information must be provided to public officials “before decisions are made and before actions are taken”); *id.* § 1502.1 (stating that EIS “shall inform decisionmakers” and be used by Federal officials to “make decisions”); *see also* *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989) (noting that NEPA’s EIS requirement serves to ensure “that the agency in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts”).

17. *See* 40 C.F.R. § 1500.1(b) (2008) (environmental information must be made available to “citizens” before actions are taken); *id.* § 1502.1 (requiring that the “EIS “shall inform . . . the

and participatory democracy.¹⁹ Although the EIS is principally procedural in nature,²⁰ federal decisionmakers must fully consider²¹ the final environmental statement before moving forward.²² In turn, the ultimate goal of all this process is essentially to nip in the bud the detrimental effects of human activities on the environment.²³

Human activities emitting GHGs²⁴ into the atmosphere link people to the

public of reasonable alternatives”).

18. Intergovernmental communication constitutes a secondary benefit of the NEPA process. *See* COUNCIL ON ENVTL. QUALITY, EXEC. OFFICE OF THE PRESIDENT, NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS, at ix (1997), *available at* <http://nepa.gov/nepa/nepa25fn.pdf> [hereinafter COUNCIL ON ENVTL. QUALITY, NATIONAL ENVIRONMENTAL POLICY ACT] (“The study participants felt that NEPA’s most enduring legacy is as a framework for collaboration between federal agencies and those who will bear the environmental, social, and economic impacts of agency decisions.”). Although not as often mentioned, NEPA does explicitly call for agency collaboration. 42 U.S.C. § 4332(C) (2000) (“Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.”).

19. *See* 40 C.F.R. § 1500.2(d) (2008) (“Federal agencies shall to the fullest extent possible . . . facilitate public involvement in decisions which affect the quality of the human environment.”); *see also* *Robertson*, 490 U.S. at 349 (finding that NEPA’s EIS requirement serves to guarantee that “the relevant information will be made available to the larger [public] audience that may also play a role in both the decisionmaking process and the implementation of that decision”).

20. The statute is procedural in the sense that so long as an EIS is prepared and considered, NEPA does not mandate any particular result; the agency may choose to go forward with its preferred action regardless of identified environmental impacts or less damaging alternatives. *See Robertson*, 490 U.S. at 350; *Strycker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980).

21. *See* *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 340–41 (D.C. Cir. 2002) (stating that an agency hard look is required for environmental assessments); *Or. Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997) (noting that with respect to NEPA documents, agency must take a “hard look” at the impacts of its action); *see also* *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (noting that judicial review requires a “searching and careful” inquiry into agency decisions), *abrogated in part*, *Califano v. Sanders*, 430 U.S. 99 (1977). *See generally* Mandelker, *supra* note 10, §§ 3:7, 8:13 (noting and discussing “hard look” doctrine).

22. *Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1115–17 (D.C. Cir. 1971).

23. *See* COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 46.

24. The most important anthropogenic GHG is carbon dioxide (CO₂), but methane (CH₄), nitrous oxide (N₂O), and certain classes of halogenated substances are also categorized as GHGs. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), CLIMATE CHANGE 2007: SYNTHESIS REPORT—SUMMARY FOR POLICYMAKERS 5 (2007), *available at* http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr_spm.pdf [hereinafter IPCC]; U.S. ENVTL. PROT. AGENCY, EXECUTIVE SUMMARY, *supra* note 4, at ES-2.

problem of global warming.²⁵ The GHG emissions associated with federal actions, in turn, implicate various aspects of NEPA's regulatory process, including identification and quantification of environmental impacts; analysis of reasonable alternatives (including the climate consequences of taking no action); and, most importantly, threshold significance determinations.²⁶

First, a compelling nexus exists between NEPA required impact analyses and project-related GHG emissions. In *Center for Biological Diversity v. National Highway Traffic Safety Administration*,²⁷ the Ninth Circuit ruled that the impact of GHG emissions on climate change is "precisely the kind of cumulative impact[] analysis that NEPA requires agencies to conduct."²⁸ Although the court subsequently vacated the decision to allow the agency the option of redoing its environmental assessment (EA) or preparing an EIS, the modified ruling retained this language and reiterated in unequivocal terms that the "intent of NEPA is to require agencies to consider and give effect to the environmental goals set forth in the Act."²⁹ Accordingly, several courts have found project-related GHG emissions and associated climate impacts as appropriately within the scope of NEPA required impact analyses.³⁰

In contrast to factoring climate into threshold significance determinations, the climate impact analysis aspect of NEPA climate integration turns out to be relatively straightforward. Available computer modeling programs exist that allow for quantification of GHG emissions.³¹ The impact question, however, is not without its own set of complications. One must examine questions of scope (what must be measured) and accountability (who must measure it). Also, data collection and analysis demand time and resources, burdens that may limit the government's ability to comply and offset the benefits of additional information.

25. According to most recent report of the Intergovernmental Panel on Climate Change (IPCC), "[t]here is *very high confidence* that the net effect of human activities since 1750 has been one of warming" and "[m]ost of the observed increase in global average temperatures since the mid-20th century is *very likely* due to the observed increase in anthropogenic GHG concentrations." IPCC, *supra* note 24, at 5.

26. See generally Madeline J. Kass, *Little NEPAs Take on Climate Goliath*, 23 NAT. RESOURCES & ENV'T 40 (Fall 2008). This list is not exclusive; other areas will also be affected (e.g., scoping).

27. 508 F.3d 508 (9th Cir. 2007), *vacated and superseded on denial of reh'g* by 538 F.3d 1172 (9th Cir. 2008) (modifying other language).

28. *Id.* at 552-58.

29. *Ctr. for Biological Diversity*, 538 F.3d at 1215.

30. See Gerrard, *Climate Change*, *supra* note 8, at 20-21.

31. Examples of carbon dioxide emission modeling tools include the Urban Emissions Model (URBEMIS), the Sustainable Communities Model (SCM), the California Climate Action Registry Reporting On-Line Tool (CARROT), and Clean Air and Climate Protect (CACP) software. See CALIFORNIA GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, TECHNICAL ADVISORY: CEQA AND CLIMATE CHANGE: ADDRESSING CLIMATE CHANGE THROUGH CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA) REVIEW 15-17 (June 19, 2008), *available at* <http://www.opr.ca.gov/ceqa/pdfs/june08-ceqa.pdf>.

In addition, failure of an agency's EIS to adequately discuss reasonably foreseeable impacts subject the federal agency to a NEPA legal challenge.³² Several adequacy challenges—based on inadequate analysis of climate impacts—have also made their way into federal courts.³³ Lastly, but most critically, without rigorous parameters for content and consistency, climate impact discussions are unlikely to meaningfully inform decisionmakers, or the public, which is the ultimate goal of NEPA.

NEPA's alternative analysis provisions present a second compelling area for NEPA climate integration. At a time when climate disruption represents a leading environmental concern facing the nation, inclusion of alternatives with their associated GHG contribution levels as well as alternatives with lower GHG contributions would advance informed³⁴ environmental decisionmaking. Although self-evident from a statutory interpretation perspective, integrating climate into the NEPA alternatives analysis would benefit from uniform principles to guide agencies and project proponents. First, the lack of federal guidelines or guidance reduces the chances of standardized alternative analyses that meaningfully inform decisionmakers and the public of climate related alternatives. Without federal leadership, NEPA climate analyses requirements may be doomed to gradually evolve through piecemeal, case-by-case judicial interpretation, generating uncertainty and postponing coordinated policy implementation.³⁵ Second, aside from failing to meaningfully inform decisionmakers and the public, failure of an agency EIS to adequately discuss reasonable alternatives opens the agency to costly and resource-intensive NEPA legal challenges.³⁶ Adequacy challenges—based on inadequate analysis of various alternatives regarding their relative contributions to global warming—have also started working their way into federal courts.³⁷

Most importantly, NEPA's required significance determination—an agency's decision as to whether a federal action will "significantly affect the human environment"³⁸ and so trigger EIS preparation—appears dependent, at least in

32. Citizen opponents may challenge the adequacy of an agency prepared EIS as a violation of 42 U.S.C. § 4332(2)(C) (2000) of NEPA pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 702 (2006). For a discussion of standing in the environmental context, see generally Randall S. Abate, *Massachusetts v. EPA and the Future of Environmental Standing in Climate Change Litigation and Beyond*, 33 WM. & MARY, ENVTL. L. & POL'Y REV. 121 (2008).

33. See, e.g., *Nw. Env'tl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125 (9th Cir. 2006).

34. If the EIS alternatives take into account relative GHG emission contributions, decision makers will be *informed* of available options, but given NEPA's procedural nature, they still will *not* be required to pick the *least damaging* climate alternative.

35. See Owen, *supra* note 8, at 84 (NEPA litigation "has not yet created a settled body of caselaw. The entire area is still subject to substantial debate." (footnote omitted)).

36. See *supra* note 32.

37. See, e.g., *Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545 (8th Cir. 2006) (involving whether the agency adequately considered coal emissions in a proposed rail extension project).

38. 42 U.S.C. § 4332(2)(C) (2000).

part, on whether and to what extent the proposed federal action will modify the atmosphere either by the addition of GHG emissions or the reduction of GHG sinks. Given documented global temperature increases, rising sea levels, and retreating glaciers; anticipated wildfire, weather,³⁹ water storage, species, ecosystem, and coastal land use threats; and potential for future catastrophic environmental devastation associated with anthropogenic GHG emissions,⁴⁰ it is difficult to see how a proposal's GHG emissions would not be a relevant factor in evaluating significance. Even if a proposal's GHG emissions are relatively insignificant globally (perhaps even indiscernible in their individual effect on climate),⁴¹ a single project's GHG emissions may have cumulative, contextual, or other significant impacts.⁴²

Yet, despite the apparent “no-brainer” nature of factoring GHG emissions into threshold significance decisions, doing so poses a serious legal conundrum for NEPA climate integration. Several confounding factors must be resolved to make sense of a climate trigger. Moreover, getting it wrong has costly litigation ramifications. As with the preparation of an inadequate EIS, a federal agency decision to forego EIS preparation entirely also subjects the agency to a potential NEPA challenge.⁴³ Such challenges—based upon an agency's failure to consider climate in determining whether to prepare an EIS—have already begun making their way into federal courts.⁴⁴

To date, despite calls for federal leadership to resolve these troubling NEPA climate integration questions,⁴⁵ the Council on Environmental Quality has yet to

39. United States' scientists expect more droughts, drenching rains, and stronger hurricanes in North America as a result of climate change. See U.S. CLIMATE CHANGE SCIENCE PROGRAM, WEATHER AND CLIMATE EXTREMES IN A CHANGING CLIMATE: REGIONS OF FOCUS: NORTH AMERICA, HAWAII, CARIBBEAN, AND U.S. PACIFIC ISLANDS 8 (June 2008) (finding it “very likely” that the frequency and intensity of heat waves and heavy downpours will rise).

40. See IPCC, *supra* note 24, at 2 (linking global climate change to human GHG emissions); *Massachusetts v. EPA*, 549 U.S. 497, 521-23 (2007) (acknowledging harms associated with climate change are “serious and well recognized” and already occurring).

41. See Burns, *supra* note 2, at 9 (noting that “businesses remain skeptical that domestic limits on greenhouse gas emissions can affect climate patterns discernibly, particularly as emission in fast-growing countries such as China continue to increase”).

42. See *infra* Part II.B; see also Kass, *supra* note 26, at 41-42.

43. Citizen opponents may challenge an agency's decision not to prepare an EIS—often referred to as a NEPA Threshold Claim—pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 702 (2006).

44. See Gerrard, *Climate Change*, *supra* note 8, at 20-21.

45. The calls for federal action have included requests for a presidential executive order, CEQ regulatory changes, and federal guidance. See generally INT'L CTR. FOR TECH. ASSESSMENT ET AL., PETITION REQUESTING THAT THE COUNCIL ON ENVIRONMENTAL QUALITY AMEND ITS REGULATIONS TO CLARIFY THAT CLIMATE CHANGE ANALYSES BE INCLUDED IN ENVIRONMENTAL REVIEW DOCUMENTS (Feb. 2008), available at <http://www.icta.org/doc/CEQ%20Petition%20Final%20Version%202-28-08.pdf>; Ctr. for Am. Progress, *Idea of the Day: An Executive Order for the National Environmental Policy Act* (May 30, 2008), <http://www.americanprogress.org/issues/ideas/>

formally adopt its own decades-old NEPA guidance for climate assessment.⁴⁶ At the same time, litigation efforts to force climate impact assessments in NEPA-mandated project reviews, while meeting with some success, have not generated a systematic or uniform approach to incorporating climate change considerations into environmental assessments.⁴⁷

To encourage and help smooth the progress of NEPA climate integration, the remainder of this Article focuses on resolution of the climate threshold determination paradox. Part II scrutinizes this particularly troubling dilemma, including problems described as *death-by-a-thousand-puffs* and *no-project-left-behind*. Part III presents options both for obtaining climate-based determinations of significance for federal actions contributing to greenhouse gas additions (or capture capacity reductions) and for restraining climate-based determinations of significance for some federal actions. The Article concludes with predictions on where we are headed—regulatory guidance, statutory reform, or neither.

II. CLIMATE THRESHOLD DETERMINATION BAMBOOZLERS

NEPA mandates the preparation of EISs for proposed legislative and major federal agency actions “significantly” affecting the human environment.⁴⁸ Accordingly, an EIS need only be prepared for federal actions anticipated to *significantly* affect the quality of the environment.⁴⁹ As a consequence, a significance determination stands as a critical preliminary step to report preparation⁵⁰ and to detailed analysis of climate change effects.⁵¹

2008/05/053008.html.

The petition filed by the International Center for Technology Assessment (ICTA), the Natural Resources Defense Council (NRDC), and the Sierra Club specifically requests that CEQ (1) amend the regulatory definitions of “significantly” and “effects” as well as the provision on environmental consequences to assure NEPA-implementing regulations require climate change effects be addressed in environmental assessments and environmental impact statements; (2) issue guidance to assure that climate change effects be addressed at each stage of the NEPA; and (3) issue a handbook to guide federal agencies in this process. INT’L CTR. FOR TECH. ASSESSMENT ET AL., *supra*, at 37-59.

46. See *supra* note 7 and accompanying text.

47. See Gerrard, *Climate Change*, *supra* note 8, at 20-21.

48. 42 U.S.C. § 4332(2)(C)(i) (2000); see also 40 C.F.R. § 1500.2 (2008).

49. See *River Rd. Alliance, Inc. v. U.S. Army Corps of Eng’rs*, 764 F.2d 445, 449 (7th Cir. 1985) (holding that EIS not required where agency finds action will not have a significant impact on the environment); see also Mandelker, *supra* note 10, § 8:34 (significance decision is “a major factor that determines whether a federal action requires an impact statement”). Note that the significance determination is not the only threshold criteria, but other trigger requirements include determination of whether an agency proposes a “major action” that is “federal” in nature. See 42 U.S.C. § 4332(2)(C) (2000).

50. Federal agencies typically prepare an EA, a type of mini-EIS, to accomplish this preliminary step. See 40 C.F.R. § 1508.9 (2008). The EA contains data and analysis for concluding either that an action may significantly impact the environment—triggering the EIS

Although NEPA does not itself define “significantly” for threshold determinations, CEQ regulations offer guidance for evaluating significance. The regulations explain that the term “significantly” calls for consideration of both “context” and “intensity.”⁵² According to NEPA’s regulatory framework, the significance of an action “must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interest, and the locality.”⁵³ Temporal (short and long-term) and spatial considerations thus play a role in the significance determination. In analyzing intensity—defined as the “severity of impact”⁵⁴—agencies take into account the “magnitude, geographic extent, duration, and frequency of effects.”⁵⁵ The implementing regulations additionally direct agencies to consider the following factors: (1) beneficial and adverse impacts;⁵⁶ (2) the degree to which the proposed action affects public health or safety;⁵⁷ (3) the unique characteristics of the geographic area;⁵⁸ (4) the degree to which the effects are likely to be highly controversial;⁵⁹ (5) “[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks”;⁶⁰ (6) “[t]he degree to which the action may establish a precedent for future actions with significant effects or

requirement—or a finding of no significant impact—relieving the agency of the EIS obligation. *See id.* § 1508.9(a)(1); *see also River Rd. Alliance*, 764 F.2d at 449 (“The purpose of an environmental assessment is to determine whether there is enough likelihood of significant environmental consequences to justify the time and expense of preparing an environmental impact statement.”).

51. This analysis covers both whether a proposal will likely affect climate (through changes in GHG emissions and/or GHG sinks) as well as whether climate change will likely affect the proposal (through climatic environmental changes). *See* McGinty Memorandum, *supra* note 7, at 1, 5. An example of the former would be whether and to what extent a U.S. Forest Service road development proposal would likely affect climate as a consequence of necessary forest clearing (GHG sink reduction) and anticipated energy use (GHG emissions). *See id.* at 5, 7. An example of the latter would be whether and to what extent an anticipated sea level rise (due to global warming) would likely affect a proposed U.S. Navy base development at the shoreline. *See id.* Both types of findings would also play a role in shaping development of mitigation (avoidance and adaptation strategies) and project alternatives in a required EIS.

52. 40 C.F.R. § 1508.27 (2008).

53. *Id.* § 1508.27(a).

54. *Id.* § 1508.27(b).

55. COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 44. CEQ defines the noted parameters as follows: “[T]he *magnitude* of an effect reflects relative size or amount of an effect. *Geographic extent* considers how widespread the effect might be. *Duration and frequency* refers to whether the effect is a one-time event, intermittent, or chronic.” *Id.*

56. 40 C.F.R. § 1508.27(b)(1) (2008).

57. *Id.* § 1508.27(b)(2).

58. *Id.* § 1508.27(b)(3).

59. *Id.* § 1508.27(b)(4).

60. *Id.* § 1508.27(b)(5).

represents a decision in principle about a future consideration”;⁶¹ (7) “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts”;⁶² (8) “[t]he degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources”;⁶³ (9) “[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act”;⁶⁴ and (10) “[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.”⁶⁵ The list, however, is nonexclusive; other considerations may influence and be determinative in a finding of significance.⁶⁶

A. Integration Dilemmas and Bamboozling Factors

Generally speaking, despite CEQ’s guidance and judicial decisions, and even without taking into account the peculiar aspects of climate change, the threshold determination presents a rather dicey area of NEPA compliance. One explanation lies in the inherent subjectivity of evaluating significance,⁶⁷ a problem NEPA leaves to agency discretion.⁶⁸ Moreover, significance is a relative concept requiring judgment not merely of impact or no impact, but impact exceeding other often unspecified, undefined points.⁶⁹ The need to make such

61. *Id.* § 1508.27(b)(6).

62. *Id.* § 1508.27(b)(7).

63. *Id.* § 1508.27(b)(8).

64. *Id.* § 1508.27(b)(9).

65. *Id.* § 1508.27(b)(10).

66. A federal agency’s own NEPA regulations may identify project types for which an EIS is normally required. See CHARLES H. ECCLESTON, NEPA AND ENVIRONMENTAL PLANNING: TOOLS, TECHNIQUES, AND APPROACHES FOR PRACTITIONERS 160, Table 6.6 (2008) (recommending ten additional factors for evaluating significance).

67. See *id.* at 156 (“Experts, let alone the public, often disagree on the significance or nonsignificance of an impact. To a certain extent, the interpretation of significance is in the eye of the beholder.”); Wishnie, *supra* note 9, at 647 (noting that significance thresholds, of necessity, are somewhat arbitrary); see, e.g., *River Rd. Alliance, Inc. v. U.S. Army Corps of Eng’rs*, 764 F.2d 445, 451 (7th Cir. 1985) (holding that significance of aesthetic impacts is “inherently subjective”). The subjectivity problem may be magnified by manipulation. See COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 51 (stating that “intentional or unintentional manipulation of assumptions can dramatically alter the results of aggregated indices”).

68. However, the degree of deference courts give to agency determinations varies. Compare *Spiller v. White*, 352 F.3d 235, 240 (5th Cir. 2003) (granting agency decisions a “considerable degree of deference”), with *Grand Canyon Trust v. Fed. Aviation Admin.*, 290 F.3d 339, 341 (D.C. Cir. 2002) (granting only “substantial deference”).

69. See, e.g., *River Rd. Alliance*, 764 F.2d at 449 (finding that the concept of significant impact “has no determinate meaning” and that “to interpret it sensibly in particular cases requires

judgments, in comparison to sometimes difficult to quantify baseline conditions⁷⁰ and within various, fuzzy contextual categories,⁷¹ adds to and complicates the already subjective, comparative nature of this evaluation.

The intensity factors helpfully identify relevant considerations, but offer limited guidance on the level of intensity necessitating a significance determination.⁷² For example, the guidance leaves unanswered and is silent as to *the degree* a proposal must impact human health to trigger EIS preparation, *how great* the impact on an endangered species or its habitat would need to be to require an EIS, or *at what point* multiple factors (and/or other unlisted factors) may operate interdependently or collectively to propel the project into the significance range.⁷³

As a practical matter, the call often comes down to whether the lead agency identifies statutory or regulatory standards of other environmental or health and safety laws that are predicted to be exceeded.⁷⁴ If an action as proposed will violate applicable limitations of other regulatory programs, the agency may find the significance threshold met; if not, a finding of non-significance follows.⁷⁵ This approach ignores the additive quality of apples and oranges type impacts, each of which may individually fall below a regulatory limitation but together have serious consequences. For example, when does a proposed action with some impact on species, some impact on historic sites, some impact on noise, some impact on wetlands, plus some impact on climate add up to a significant effect on the environment? Not surprisingly, one NEPA consultant has observed that “[a]rguably, the concept of significance is the single most complex, elusive

a comparison that is also a prediction: whether the time and expense of preparing an environmental impact statement are commensurate with the likely benefits from a more searching evaluation than an environmental assessment provides”).

70. See ECCLESTON, *supra* note 66, at 161. Moreover, when courts do not make use of a comparative baseline, the decisions can seem random or arbitrary. See Mandelker, *supra* note 10, § 8:34 (“When courts do not explicitly identify a baseline on which they make their significance determination, they necessarily make this decision on a case-by-case basis that gives an ad hoc flavor to the significance decision.”).

71. See 40 C.F.R. § 1508.27(a) (2008) (“Significance varies with the setting of the proposed action.”); *Simmans v. Grant*, 370 F. Supp. 5, 15 (S.D. Tex. 1974) (citing *Hanly v. Mitchell*, 460 F.2d 640, 646-47 (2d Cir. 1972) (recognizing importance of locale for significance determination)).

72. See *River Rd. Alliance*, 764 F.2d at 450 (noting that CEQ regulations defining “significant” are of little help in making significance determination); see also COUNCIL ON ENVTL. QUALITY, *CONSIDERING CUMULATIVE EFFECTS*, *supra* note 7, at 49 (“Analyzing cumulative effects under NEPA is conceptually straightforward but practically difficult.”).

73. One NEPA consultant recommends evaluating “[t]he degree to which a multiple number of different and substantial but individually nonsignificant impacts affect the environment” because the individually nonsignificant impacts might collectively generate “an overall significant impact.” See ECCLESTON, *supra* note 66, at 160.

74. See *id.* at 158.

75. See *id.*

concept in NEPA.”⁷⁶

Federal courts have reiterated the need for consideration of contextual and severity factors, but arguably have done little to meaningfully clarify the statutory standard.⁷⁷ With respect to judicial review, federal courts have generally decided cases on an “ad hoc” basis—without illuminating any criteria for determining the environmental significance of the federal action⁷⁸—and have split even as to the proper role of CEQ’s intensity factors in agency decisions.⁷⁹ Adding to the confusion, the federal courts disagree as to the certainty of significance required, with some courts requiring EIS preparation only where “substantial questions” exist as to whether an action “may” have a significant effect on the environment.⁸⁰ Accordingly, it has been noted that “[p]robably no other concept has elicited as much confusion or litigation.”⁸¹

B. The New Wrench in the Works: Climate Impact Significance

Tossing climate into the mix, significance factors appear to exacerbate and complicate these existing analytical difficulties. Making contextual judgments,

76. *Id.* at 156.

77. See COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 4 (“Court cases throughout the years have affirmed CEQ’s requirement to assess cumulative effects of projects but have added little in the way of guidance and direction.”); see also *River Road Alliance*, 764 F.2d at 450 (noting that case precedent offers little help in making a significance determination). In *River Road Alliance*, the court explained the lack of judicial clarification as follows: “So varied are the federal actions that affect the environment—so varied are the environmental effects of those actions—that the decided cases compose a distinctly disordered array.” *Id.* (referencing WILLIAM H. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW 756-61 (1977)); see also ECCLESTON, *supra* note 66, at 156 (“In many instances, the courts have done little more than redefining significance in terms of other equally enigmatic concepts or wording. For example, the courts have variously defined significantly to mean ‘not trivial,’ ‘appreciable,’ ‘important,’ and ‘momentous.’”).

78. See Mandelker, *supra* note 10, §§ 8:49, 8:50 (explaining “ad hoc” nature of significance determinations and listing numerous examples).

79. Compare *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 361 F.3d 1108, 1125 (9th Cir. 2004) (holding that one intensity factor is enough to mandate EIS preparation), *amended by* 402 F.3d 846, with *Curry v. U.S. Forest Serv.*, 988 F. Supp. 541, 553 (W.D. Pa. 1997) (stating the presence of only one intensity factor “does not mandate” EIS preparation). At least one court has held CEQ’s factors are merely guides or aids for agency decisionmaking. See, e.g., *Advocates for Transp. Alternatives, Inc. v. U.S. Army Corps of Eng’rs*, 453 F. Supp. 2d 289, 301 (D. Mass. 2006).

80. See *Save Our Ten Acres v. Kreger*, 472 F.2d 463, 467 (5th Cir. 1973); see also *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508, 552 (9th Cir. 2007) (citing several Ninth Circuit decisions following such standard), *vacated and superseded on denial of reh’g by* 538 F.3d 1172. It has also been suggested that the meaning of “significant” be fixed at the lower end of the spectrum that runs from “not trivial” to “momentous.” *Hanly v. Kleindienst*, 471 F.2d 823, 837, 839 (2d Cir. 1972) (Friendly, C.J., dissenting).

81. ECCLESTON, *supra* note 66, at 156.

sussing out significant impacts, and identifying relevant resource thresholds seem just a bit more befuddling in the climate change context.

1. *Death-by-a-Thousand-Puffs*.—Given documented global temperature increases,⁸² rising sea levels⁸³ and retreating glaciers;⁸⁴ anticipated wildfire,⁸⁵ extreme weather,⁸⁶ water storage, species,⁸⁷ ecosystem,⁸⁸ and coastal land use threats; and potential for worldwide catastrophic environmental devastation and epidemic public health implications⁸⁹ associated with anthropogenic GHG

82. IPCC, *supra* note 24, at 2 (“Warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice and rising global average sea level.”).

83. *Id.* at 6 (“Human influences have: *very likely* contributed to sea level rise during the latter half of the 20th century . . .”).

84. According to Nobel Peace Prize winner and former Vice President Albert Gore: Scientists with access to data from Navy submarines traversing underneath the North polar ice cap have warned that there is now a 75 percent chance that within five years the entire ice cap will completely disappear during the summer months. This will further increase the melting pressure on Greenland. According to experts, the Jakobshavn glacier, one of Greenland’s largest, is moving at a faster rate than ever before, losing twenty million tons of ice every day, equivalent to the amount of water used every year by the residents of New York City.

Albert Gore, Former Vice-President, Address at Daughters of the American Revolution Constitution Hall: A Generational Challenge to Repower America (July 17, 2008) (transcript and video available at http://www.algore.org/generational_challenge_repower_america_al_gore).

85. Interestingly, scientists anticipate both that rising global temperatures are likely to increase the number of wildfires and that wildfire smoke may blunt the pace of increasing temperatures. Lauren Morello, *Forests: Wildfire Smoke Could Briefly Dampen Arctic Warming, Study Finds*, CLIMATEWIRE, July 23, 2008, <http://www.eenews.net/climatewire/2008/07/23/archive/3?terms=wildfire>.

86. *See, e.g.*, IPCC, *supra* note 24, at 2 (“There is observational evidence of an increase in intense tropical cyclone activity in the North Atlantic since about 1970.”).

87. *See* Chris D. Thomas et al., *Extinction Risk from Climate Change*, 427 NATURE 145, 145 (2004).

88. *See, e.g.*, IPCC, *supra* note 24, at 9 (identifying particular ecosystems especially likely to be affected by climate change).

89. “[T]here will be serious consequences for human health, including the spread of infectious and respiratory diseases, if worldwide emissions continue on current trajectories.” Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin., 508 F.3d 508, 523 (9th Cir. 2007), *vacated and superseded on denial of reh’g by* 538 F.3d 1172. Adverse health impacts will not be limited to areas outside the United States. *See, e.g.*, Tom H. Brikowski et al., *Climate-related Increase in the Prevalence of Urolithiasis in the United States*, 105 PNAS 9841, 9841–42 (July 15, 2008) (finding kidney stones likely to become more common in southeastern United States as a result of global warming); *see generally* IPCC, *supra* note 24, at 13, Table SPM.3 (listing examples of possible human health impacts as a result of global warming); KRISTIE L. EBI ET AL., U.S. ENVIRONMENTAL PROTECTION AGENCY, U.S. CLIMATE CHANGE SCIENCE PROGRAM, ANALYSES AND EFFECTS OF GLOBAL CHANGE ON HUMAN HEALTH AND WELFARE AND HUMAN SYSTEMS, ch. 2, 2-1

emissions,⁹⁰ it is difficult to see how GHG contributions from proposed federal actions do not demand consideration as part of a NEPA contextual and intensity analysis.⁹¹ And yet, any single project's GHG emissions—even a very large or long-term project—will likely be relatively minor, even indiscernible, globally.⁹² By way of illustration, worldwide combined manufacturing and construction industries contributed just 10% of total GHG emission in 2000,⁹³ meaning any single individual manufacturing facility project would represent a minute fraction of a minor percentage of total emissions. From another perspective, the United States—now the second largest contributor of worldwide GHG emissions⁹⁴—contributes approximately 20% of worldwide GHG emissions per

to 2-78 (July 2008) (noting that global warming is likely to lead to an increase in heat-related deaths, as well an increase in cardiopulmonary illness from ozone pollution, and foodborne diseases).

90. See *Massachusetts v. EPA*, 549 U.S. 497, 523 (2007) (“EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming.”); IPCC, *supra* note 24, at 5 (“Most of the observed increase in global average temperatures since the mid-20th century is very *likely* due to the observed increase in anthropogenic GHG concentrations.”).

91. CEQ regulations clarify that “reasonably foreseeable” impacts, for purposes of triggering NEPA consideration, include those impacts which “have catastrophic consequences, even if their probability of occurrence is low, provided the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.” 40 C.F.R. § 1502.22(b)(4) (2008). In addition to buy-in of well-respected international associations, scientists worldwide, and even a reluctant President, the Supreme Court has acknowledged that harms associated with climate change are “serious and well recognized” and already occurring and that “the risk of catastrophic harm, though remote, is nevertheless real.” *Massachusetts*, 549 U.S. at 521.

92. Several academics and legal practitioners have come to a similar conclusion. See, e.g., Wishnie, *supra* note 9, at 644 (“[T]he only thing that is clear from the case law is that it will be extremely hard, in the vast majority of cases, to show that a federal project that produces GHG emissions meets the significance requirement. Most projects, regardless of their size, will be objectively insignificant.”); Michael H. Zischke & Sarah E. Owsowitz, *Climate Change and the California Environmental Quality Act*, COX, CASTLE & NICHOLSON LLP 6-8 (July 2007), available at http://www.coxcastle.com/images/ps_attachment/attachment204.pdf (determining whether emissions are significant for California Environmental Quality Act (CEQA) Environmental Impact Report (EIR) will remain difficult until regulatory thresholds set).

93. KIRSTIN DOW & THOMAS E. DOWNING, *THE ATLAS OF CLIMATE CHANGE: MAPPING THE WORLD'S GREATEST CHALLENGE* 41 (2007).

94. China overtook the United States as the leading emitter of carbon dioxide (by volume) in 2008; however, U.S. per capita emissions still exceed China's per person contributions. See Gillian Murdoch, *China Top Carbon Emitter, Beijing Under Pressure*, REUTERS NEWS SOURCE, June 13, 2008, available at <http://www.reuters.com/article/environmentNews/idUSL1319124020080613?sp=true>; see also Netherlands Environmental Assessment Agency, *Global CO₂ Emissions: Increase Continued in 2007*, <http://www.mnp.nl/en/publications/2008/GlobalCO2emissionsthrough2007.html> (last visited Jan. 26, 2009).

year.⁹⁵ If all U.S. sources combined (land use, forestry, transportation, energy, manufacturing, construction, agriculture, shipping, aviation, industrial processes, etc.) make up just a fifth of worldwide emissions, any one U.S. emitter, in any one sector, will undoubtedly be truly minuscule by comparison. Applying this approach, a proposal for a discount superstore estimated to emit 16,000 metric tons of carbon dioxide equivalents per year, when compared to aggregate emissions of twenty-six gigatonnes of carbon dioxide per year,⁹⁶ would represent a mere .0061% of worldwide emissions.⁹⁷ By way of a more concrete example, in the late 1980s, the National Highway Traffic and Safety Administration (NHTSA) found that a “maximum, hypothetical fraction of *one percent* change in carbon dioxide” produced by a proposed rulemaking action for nationwide vehicle fuel economy standards too insignificant to trigger EIS preparation.⁹⁸ NHTSA used a similar argument, albeit less successfully, to support a finding of non-significance with respect to a later rulemaking for fuel economy standards for light trucks.⁹⁹ In both instances the agency made the *too small* argument despite the fact that transportation accounts for approximately 28% of all GHG emissions in the United States.¹⁰⁰

95. Percentage based on year 2000 data. KENNETH BAUMERT ET AL., PEW CTR. ON GLOBAL CLIMATE CHANGE, CLIMATE DATA: INSIGHTS AND OBSERVATIONS 4, fig. 1 (2004). *But see* DOW & DOWNING, *supra* note 93, at 40-41 (U.S. emissions approximately 27% of total emissions).

96. A “gigatonne” is a billion metric tones. ROBERT HENSON, THE ROUGH GUIDE TO CLIMATE CHANGE: THE SYMPTOMS, THE SCIENCE, THE SOLUTIONS 32 (2006). The twenty-six gigatonne figure comes from 2002 data drawn from analyses by the Intergovernmental Panel on Climate Change (IPCC) and the Pew Center on Global Climate Change (PCGCC). *Id.*

97. The projected estimate for this illustration came from an example project calculation prepared by the California Air Pollution Control Officers Association (CAPCOA) for a discount superstore commercial project: 241,000 square feet, employing 400 people, and located in San Joaquin Valley. *See* GREG THOLEN ET AL., CAL. AIR POLLUTION CONTROL OFFICERS ASS’N, CEQA & CLIMATE CHANGE: EVALUATING AND ADDRESSING GREENHOUSE GAS EMISSIONS FROM PROJECTS SUBJECT TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 62-3 (Jan. 2008), *available at* <http://www.climatechange.ca.gov/publications/others/CAPCOA-1000-2008-010.PDF>.

98. NHTSA calculated the less than 1% increase as follows:

NHTSA concluded that a one mile per gallon reduction would result in an increase in carbon dioxide emissions of 17.75 billion pounds over the fleet’s 20-year lifespan. It then compared this substantial net increase to the total amount of carbon dioxide that would be emitted into the global atmosphere anyway. Using that calculus, the 17.75 billion pounds represented a less than one percent increment over existing emissions.

City of L.A. v. Nat’l Highway Traffic Safety Admin., 912 F.2d 478, 500 (D.C. Cir. 1990) (Wald, C.J., dissenting), *overruled on other grounds by* *Fla. Audubon Soc’y v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996).

99. *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508, 554 (9th Cir. 2007), *vacated and superseded on denial of reh’g by* 538 F.3d 1172 (9th Cir. 2008) (replacing other language). The agency also argued the rules impact on global warming too speculative for NEPA review. *Id.*; *see also infra* notes 138-43 and accompanying text.

100. The court voted 2-1 to accept the agency’s finding. *See City of L.A.*, 912 F.2d at 500

Thus, while *consideration* of climate effects is plainly warranted as part of any significance evaluation, an *actual determination* of significance—due to climate effects—seems implausible in-fact. This situation epitomizes the long recognized NEPA quandary known as the “tyranny of small decisions.”¹⁰¹ Thousands of federal actions,¹⁰² each contributing a relatively wee fraction of worldwide GHG emissions, combine to increase the likelihood of devastating global climate change related impacts,¹⁰³ yet fall below the bar for EIS preparation.

Other factors also complicate climate significance determinations. First, no accepted method for tracing specific GHG emissions to specific climate impacts currently exists.¹⁰⁴ Second, less certainty exists as to the predicted effects of climate change, in contrast to the degree of certainty regarding global warming itself. As a consequence, linking a specific proposal’s GHG emissions to particular environmental impacts associated with climate change may appear speculative¹⁰⁵ or attenuated.¹⁰⁶ Judicial adoption of this view can be

(Wald, C.J., dissenting).

101. See *infra* notes 117-20 and accompanying text. The catchphrase “tyranny of small decisions” puts a name to the acknowledgment that “the most devastating environmental effects may result not from the direct effects of a particular action, but rather from the combination of individually minor effects of multiple actions over time.” COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 1 (quoting William E. Odum, *Environmental Degradation and the Tyranny of Small Decisions*, 32 BIOSCIENCE 728, 728 (1982)); see also ECCLESTON, *supra* note 66, at 241 (“[T]he greatest single adverse environmental impact actually tends to be the result of an incessant multitude of relatively small actions, which together extract a horrific toll on environmental resources.”).

102. According to CEQ, federal agencies make thousands of small decisions annually. See COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 4 (noting roughly 45,000 EAs prepared annually).

103. See DANIEL B. FAGRE ET AL., U.S. CLIMATE CHANGE SCI. PROGRAM, SYNTHESIS AND ASSESSMENT PRODUCT 4.2: THRESHOLDS OF CHANGE IN ECOSYSTEMS 5-7 (public review draft Aug. 14, 2008). According to the draft report, even slight warming may push ecosystems across thresholds that would render restoration extremely difficult or impossible. *Id.* at 5. As an example, the draft report offers the melting of arctic tundra snow due to climate change. *Id.* at 6. With melting, reduced snow cover exposes dark vegetation that absorbs heat from the sun more than snow, which leads to greater warming. *Id.* This fosters invasion of shrubs into the tundra, which in turn further adds to warming. “The net result is a relatively sudden domino-like conversion of the arctic tundra triggered by a relatively slight temperature increase.” *Id.* at 6-7.

104. See HENSON, *supra* note 96, at 31. Note, this tracing limitation must be distinguished from the scientific consensus concerning the facts that (1) global warming is occurring and (2) anthropocentric GHG emission are contributing to the problem.

105. See *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1221 (9th Cir. 2008) (noting that the NHTSA argued a rule making’s impact on global warming was “too speculative”). In California, state agencies faced with a significance determination under the state’s NEPA equivalent, the California Environmental Quality Act (CEQA), have come to this “too speculative” conclusion. See Zischke & Owsowitz, *supra* note 92, at 4 (“One approach that

determinative because NEPA lead agencies need not consider highly speculative (purely conjectural) effects in determining whether to prepare an EIS.¹⁰⁷ Relied on by various agencies, the “too speculative” position has not yet proven particularly successful in avoiding review of climate related GHG impacts under NEPA. In a case before the Ninth Circuit, the NHTSA took precisely this position—unsuccessfully—in declining to prepare an EIS for GHG impacts associated with its proposed corporate average fuel economy (CAFE) standards for light trucks.¹⁰⁸ The Eighth Circuit also initially rejected the “too speculative” justification made by the Surface Transportation Board for its failure to consider carbon dioxide emissions in an EA for a rail line construction project.¹⁰⁹ The “too speculative” position, however, has been moderately more successful in avoiding close review of climate related GHG impacts under state NEPA laws

some agencies have taken is to disclose climate change issues with some level of qualitative discussion and then conclude that any determination of significance would be speculative.”).

106. The too attenuated or too remote position stems from a NEPA regulatory provision that only “reasonably foreseeable” impacts come within NEPA’s scope. *See* 40 C.F.R. § 1508.7 (2008); *see also* Wishnie, *supra* note 9, at 639 (describing a “reasonably close” relationship requirement in NEPA analogous to tort doctrine of proximate cause).

107. CEQ regulations distinguish between addressable uncertainty and pure conjecture with respect to uncertainties associated with relevant information in an EIS. *See* 40 C.F.R. § 1502.22 (2008); *see also* *No GWEN Alliance, Inc. v. Aldredge*, 855 F.2d 1380, 1385 (9th Cir. 1988) (holding that agencies are not required to analyze “remote and highly speculative” impacts that bear only an attenuated relationship to the proposed action (citing *Trout Unlimited v. Morton*, 509 F.2d 1276, 1283 (9th Cir. 1974))); *see generally* *City of Riverview v. Surface Transp. Bd.*, 398 F.3d 434, 442 (6th Cir. 2005) (noting that environmental analysis was not needed since any such analysis would be based surely on conjecture). *But see* *Am. Pub. Transit Ass’n v. Goldschmidt*, 485 F. Supp. 811, 833-34 (D.D.C. 1980), *overruled on other grounds by* *Am. Pub. Transit Ass’n v. Lewis*, 655 F.2d 1272 (holding that an EIS was required despite the Department of Transportation’s inability to forecast all environmental effects where the proposed regulations were “presently susceptible to assessment”).

108. *See Ctr. for Biological Diversity*, 538 F.3d at 1221, 1227 (court required a revision of Agency’s EA that disregarded global warming as “too speculative”); *see also infra* notes 139-43 and accompanying text.

109. *Mid States Coal. for Progress v. Surface Transp. Bd.*, 345 F.3d 520, 548-50 (8th Cir. 2003) (EA held inadequate for failure to examine effects of increase in coal consumption and board’s argument that such effects were too speculative rejected). Plaintiffs challenged the agency’s EA for failing to consider the increased supply of low-sulfur coal and the resulting air pollutant emissions (including carbon dioxide emissions) associated with the proposed rail line’s improved access to such coal. *Id.* at 548. The court, however, subsequently found adequate the board’s EIS, which noted in a rather summary fashion that any potential local air quality impacts were “speculative” and “ultimately unforeseeable” based on modeling data. *See Mayo Found. v. Surface Transp. Bd.*, 472 F.3d 545, 556 (8th Cir. 2006). Unlike the Ninth Circuit’s ruling, discussed *supra* note 108 and *infra* notes 139-43 and accompanying text, the Eighth Circuit did not explicitly address the global climate effects of carbon dioxide emissions, but rather focused on U.S. air quality impacts of the emissions in both decisions. *Id.*

(little NEPAs) in cases where agencies prepared environmental impact documents.¹¹⁰

The consequences of the seemingly inconsequential contributions of any individual project emissions to global atmospheric GHG levels and the inability to link project emissions to any specific climate effects are twofold. First, for proposed actions that would not otherwise cross the significance threshold, no EIS evaluating adverse or beneficial project effects relating to climate change, assessing less climate impacting alternatives, or identifying climate related mitigation options, need be prepared.¹¹¹ Second, even if other, non-climate related impacts trigger EIS preparation, the lead agency need not evaluate (or closely evaluate) climate related impacts¹¹²—and may even deem it inappropriate

110. See *El Charro Vista v. City of Livermore*, No. RG07342392 (Cal. Super. Ct. Alameda County July 28, 2008) (rejecting a climate change challenge to an environmental impact review statement on jurisdictional grounds but noting evidence in the record supported city's determination that such impacts are too speculative for further evaluation); *Santa Clarita Oak Conservancy v. City of Santa Clara*, No. BS084677, 2007 WL 5084459 (Cal. Super. Ct. L.A. County Aug. 15, 2007) (California CEQA EIR analysis for a proposed industrial park project adequately evaluated the impact of climate change on water supply for the project. The analysis concluded that the impact of climate change on water supply was too speculative to conduct a quantitative review of the specific impacts). But see *Ctr. for Biological Diversity v. City of Desert Hot Springs*, No. RIC 464585 (Cal. Super. Ct. Riverside County Aug. 6, 2008) (EIR required under CEQA for a large residential and commercial development held inadequate for, among other things, failing to "make a meaningful attempt to determine the project's effect upon global warming before determining that any such analysis would be speculative").

111. For an example of this type of NEPA climate outcome, see *City of L.A. v. National Highway Traffic Safety Administration*, 912 F.2d 478, 501 (D.C. Cir. 1990) (Wald, C.J., dissenting), *overruled on other grounds by Florida Audubon Society v. Bentsen*, 94 F.3d 658 (D.C. Cir. 1996).

112. See *Mayo Found.*, 472 F.3d at 555-56. After an initial holding that the agency's EIS for a proposed rail line to transport coal to power plants was inadequate for failing to consider carbon dioxide emissions at all in its EIS, the agency noted in a supplemental EIS that, based on modeling data, anticipated carbon dioxide emissions would be small and potential local air quality impacts "speculative." *Id.* The Eighth Circuit approved this rather skimpy climate analysis as adequate. *Id.* at 556 ("We . . . believe that the Board more than adequately considered 'reasonably foreseeable significant adverse effects . . .'"). Similarly, California agencies have used the "too speculative" position to successfully avoid close analysis of climate impacts in environmental review reports required by the CEQA. See *El Charro Vista*, No. RG07342392 (court noted evidence in the record supported city's determination that such impacts are too speculative for further evaluation); *Santa Clarita Oak Conservancy*, No. BS084677, 2007 WL 5084459 (EIR analysis concluding that the impact of climate change on water supply was too speculative to conduct a quantitative review of the specific impacts found to adequately evaluate the impact of climate change on water supply for the project). But see *City of Desert Hot Springs*, No. RIC464585 (EIR required under CEQA for a large residential and commercial development held inadequate for, among other things, failing to "make a meaningful attempt to determine the project's effect upon global warming before determining that any such analysis would be speculative").

to do so—under the existing CEQ regulations that require preparers to focus on “significant” impacts.¹¹³

Thus, like death by a thousand cuts—or more aptly *death-by-a-thousand-puffs*—climate impacts seemingly would never—or almost never—trigger and/or be subject to evaluation in a NEPA EIS and, contrary to the primary policy objectives of NEPA—informing decisionmakers and reducing adverse environmental effects¹¹⁴—the devastating, potentially catastrophic, environmental impacts associated with climate disruption, the availability of less impacting alternatives, and opportunities to mitigate climate changes escape the attention of decisionmakers and the public. Moreover, the potential for using NEPA’s detailed statements for new purposes, such as a collective informational database of climate information, would be lost.¹¹⁵ Chief Judge Wald of the D.C. Circuit posed the quandary this way: “If global warming is the result of the cumulative contributions of myriad sources, any one modest in itself, is there not a danger of losing the forest by closing our eyes to the felling of the individual trees?”¹¹⁶

2. *The Cumulative GHG Impacts Bamboozler—No-Project-Left-Behind.*—Consideration of cumulative effects appears to offer a way around the tyranny of small GHG decisions, yet this poses its own confounding dilemma. At first glance, cumulative analysis of the GHG emissions of agency actions seems to require EIS preparation for every, or almost every, conceivable agency proposal. Whereas evaluating proposed GHG emissions with global levels would seem *never* to lead to EIS preparation, cumulative analysis would seem *always* to lead to EIS preparation.

NEPA’s implementing regulations define “cumulative impact” as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency . . . or person undertakes such other actions.”¹¹⁷ The regulations clarify that individually insignificant but cumulatively significant impacts justify EIS preparation.¹¹⁸ The existence of cumulatively significant impacts, in turn,

113. The CEQ regulations provide that in preparing an EIS agencies “shall focus on significant environmental issues” and “[i]mpacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.” 40 C.F.R. §§ 1502.1, 1502.2(b) (2008); *see also id.* § 1500.4(c).

114. *See supra* notes 15-22 and accompanying text.

115. *See* Wishnie, *supra* note 9, at 638 (“EISs can become a collective resource of information on the GHG impacts of government activities,” a “knowledge base” for “build[ing] our understanding of global warming”).

116. *City of L.A.*, 912 F.2d at 501 (Wald, C.J., dissenting).

117. 40 C.F.R. § 1508.7 (2008). According to CEQ, “[c]umulative effects result from spatial (geographic) and temporal (time) crowding of environmental perturbations.” COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 7.

118. *See* 40 C.F.R. § 1508.27(b)(7) (2008) (“Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.”).

depends predominantly on comparison with baseline conditions and relevant resource thresholds and on contextual considerations.¹¹⁹ Thus, the tyranny of small decisions predicament receives regulatory attention and potential resolution through the lens of cumulative effects.¹²⁰ However, it is just never quite as simple as it seems.

3. *If the Cumulative Analysis Shoe Fits . . .*—The collective, additive nature of GHG emissions on climate change supports cumulative impacts analysis as a means for crossing the significance barrier to EIS preparation. A scientific consensus exists that, due to past and continuing accumulations of atmospheric GHGs, worldwide temperature is rising.¹²¹ It follows that each proposed federal action—which directly or indirectly emits GHGs¹²² or eliminates GHG sinks—will affect atmospheric GHG levels and may likely¹²³ cause reasonably foreseeable climate impacts.¹²⁴

As a consequence of this causal link, project related GHG emissions readily fall into several recognized types of cumulative effects to be considered by agencies under NEPA. First, project related GHG emissions mimic “time crowding” cumulative effects by virtue of their repetitive, additive effects on

119. COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at vi. Determining cumulative significance can present unique analytical difficulties. *Id.* at vi-vii. In addition, determining the significance of cumulative effects suffers from the same hitches as does determining significance of direct effects: subjectivity, relativity, and geographic disconnectivity. *See supra* Part II.A.

120. *See* COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 1 (“NEPA provides the context and carries the mandate to analyze the cumulative effects of federal actions.”). According to CEQ, “[t]he passage of time has only increased the conviction that cumulative effects analysis is essential to effectively managing the consequences of human activities on the environment.” *Id.* at 3. For cases recognizing a requirement for agency consideration of cumulative effects, see *Mountaineers v. U.S. Forest Services*, 445 F. Supp. 2d 1235, 1247-50 (W.D. Wash. 2006); *Manatee County v. Gorsuch*, 554 F. Supp. 778, 793-94 (M.D. Fla. 1982); *Sierra Club v. Bergland*, 451 F. Supp. 120, 129 (N.D. Miss. 1978) (all holding that cumulative impacts was required in significance determination). *See also* Mandelker, *supra* note 10, § 8:37 (“NEPA’s purposes would be frustrated if a federal action could be considered in isolation without regard to its cumulative effects.”).

121. *See supra* text accompanying notes 82-90.

122. Very few, if any, agency actions will land outside this grouping because the primary source of GHGs is energy use, something likely common to most every project or program proposal.

123. A fuzzy “may likely” is used here (rather than a more macho “will”) only because some proposed actions may incorporate carbon off-setting strategies so as to create a carbon neutral effect on atmospheric GHG levels. *See* Owen, *supra* note 8, at 86 (“Unless its emissions are effectively offset, every individual GHG-emitting project contributes to climate change.” (footnote omitted)).

124. *See id.* (“Although those individual contributions might seem small, and articulating a causal chain between individual contributions and particular storms or droughts is impossible, scientists generally agree that the more GHGs are emitted into the atmosphere, the more temperatures will rise, with corresponding increases in adverse consequences.”)

climate.¹²⁵ Like forest harvesting rates that exceed regrowth rates,¹²⁶ project GHG emission rates exceed rates of atmospheric assimilative capacity because GHGs are already above sustainable levels. According to U.S. government scientists “emissions of carbon dioxide and other heat-trapping gases *have warmed* the oceans and led to an energy imbalance that *is causing* and will continue to cause, significant warming, increasing the urgency of reducing CO2 emissions.”¹²⁷ Second, project related GHG emissions produce “time lag” cumulative effects by virtue of their snow-balling impact on climate (albeit an inappropriate simile).¹²⁸ Just as exposure to carcinogens may not produce identifiable health effects until many years after project initiation, project related releases of GHGs may not produce visibly extreme climate effects until several decades into the future.¹²⁹ Third, and practically by definition, agency actions with GHG emissions present “trigger and threshold” cumulative effects—effects characterized by “fundamental changes in system behavior or structure.”¹³⁰ Findings by the IPCC support the potential for fundamental systemic changes: “Anthropogenic warming over the last three decades has *likely* had a discernible influence at the global scale on observed changes in many physical and biological systems.”¹³¹ CEQ, in fact, offers up “global climate change” to illustrate this category of cumulative effects.¹³² In short, because past anthropocentric emissions have bumped atmospheric GHG levels at or above system capacity,¹³³ arguably, any and all new additions (including those from proposed agency actions) cumulatively exacerbate environmental effects of rising temperatures.¹³⁴ Moreover, consequence uncertainty does not automatically

125. The concept of “time crowding” cumulative effects comes from CEQ informal guidance. See COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 7-9, Table 1-3; Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt., 387 F.3d 989, 994 (9th Cir. 2004) (noting that the “most obvious” way cumulative impacts of multiple projects can be significant is that “the greater total magnitude of the environmental effects . . . may demonstrate by itself that the environmental impact will be significant”).

126. See COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 9, Table-1-3.

127. Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin., 538 F.3d 1172, 1222 (9th Cir. 2008) (emphasis added).

128. The concept of “time lag” cumulative effects comes from CEQ informal guidance. See COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 9, Table 1-3.

129. The carcinogen analogy is also based on an example provided in CEQ guidance. See *id.*

130. *Id.* The concept of “triggers and threshold” cumulative effects comes from CEQ informal guidance. See *id.*

131. IPCC, *supra* note 24, at 6.

132. See COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 9, Table 1-3.

133. See FAGRE ET AL., *supra* note 103, at 75-77.

134. See *id.* at 77-79 (even slight warming may push ecosystems across thresholds that would render restoration extremely difficult or impossible); IPCC, *supra* note 24, at 7 (“Continued GHG emissions at or above current rates would cause further warming and induce many changes in the

prevent analysis.¹³⁵

CEQ recognized the applicability of cumulative effects analysis to climate over a decade ago.¹³⁶ According to CEQ's 1997 Cumulative Effects guidance, "[d]irect effects continue to be most important to decisionmakers, in part because they are more certain. Nonetheless, the importance of . . . climate change, and other cumulative effects problems has resulted in many efforts to undertake and improve the analysis of cumulative effects."¹³⁷

More recently, the Ninth Circuit has come to the same conclusion. In *Center for Biological Diversity v. National Highway Traffic Safety Administration*, the court announced: "The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."¹³⁸ In the case, several state and public interest plaintiffs challenged a rulemaking by the NHTSA setting CAFE standards for light trucks. Plaintiffs alleged, inter alia, that NHTSA had violated NEPA by failing to take a hard look at the GHG implications of its rulemaking, examine the rule's cumulative impact, and prepare an EIS.¹³⁹ The NHTSA justified its finding of insignificant impact by arguing the projected carbon dioxide emissions associated with the rulemaking were "self-evidently" too small to have a significant impact on the environment and too speculative to require an EIS.¹⁴⁰ The court directly addressed the question of cumulative effects of GHG emissions on climate change in holding NHTSA's environmental assessment inadequate.¹⁴¹ Specifically, the court rejected the agency's EA documentation because it had failed to adequately evaluate the incremental impact carbon dioxide emissions would have on climate change in light of "other past, present, and reasonably foreseeable actions," such as other CAFE rulemakings.¹⁴² Even the fact that the NHTSA projected the rulemaking action would *decrease* carbon dioxide emission rates—as compared to the existing rule—did not alter the court's conclusion.¹⁴³

global climate system during the 21st century that would *very likely* be larger than those observed during the 20th century.").

135. See COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 46-47 (recognizing and addressing inherent uncertainties in cumulative effects analyses).

136. *Id.* at 7 (noting the effects of GHG emissions on climate change).

137. *Id.*

138. 538 F.3d 1172, 1217 (9th Cir. 2008); see also Owen, *supra* note 8, at 60 ("Climate change is a classic example of a 'cumulative' environmental impact . . .").

139. *Ctr. for Biological Diversity*, 538 F.3d at 1181.

140. *Id.* at 1221.

141. *Id.* at 1182.

142. *Id.* at 1216.

143. The Ninth Circuit reasoned: "[S]imply because the Final Rule may be an improvement over the MY 2007 CAFE standard does not necessarily mean that it will not have a 'significant effect' on the environment . . . NHTSA has not explained *why* its rule will not have a significant effect." *Id.* at 1224. According to the court, the agency had failed to explain why a small decrease in the growth of CO₂ emissions (as opposed to a greater decrease) would not have a significant

But herein lies the cumulative effects bamboozler: If past contributions are at, or have already exceeded, the atmosphere's assimilative capacities (meaning the existing global environmental baseline is already significantly impaired)¹⁴⁴ and must be reduced to avoid both further global temperature increases and the reasonably foreseeable colossal environmental wreckage associated with a warming earth, then every future GHG emitter contributes to an already cumulatively significant harm and should be required to prepare an EIS. Along these lines, Professor Owen has argued, with respect to climate considerations under the CEQA,¹⁴⁵ California's "little NEPA" statute,¹⁴⁶ that:

Unless its emissions are effectively offset, every individual GHG-emitting project contributes to climate change. GHGs are generally long-lived and well-mixed, so there is no inconsequential location or time for GHG emissions to occur, and each GHG-emitting project inexorably adds to the worldwide total. No reasonable doubt exists that rising worldwide totals are already causing, and will continue to cause, severe and sometimes catastrophic consequences Every project that adds new GHG emissions therefore makes a serious environmental problem worse. Those incremental contributions cannot legally be dismissed as *de minimis* or inconsequential.¹⁴⁷

At first glance then, it appears that using a cumulative effects analysis to avoid *death-by-a-thousand-puffs* may unintentionally lead directly to a *no-project-left-behind* situation—every (or practically every) proposed action would be subject to the NEPA EIS requirement.¹⁴⁸

impact on the environment and so its determination of insignificance was arbitrary and capricious. *Id.* at 1221-24. Specifically, the court noted, "[I]t is hardly 'self-evident' that a 0.2 percent decrease in carbon emissions (as opposed to a greater decrease) is not significant." *Id.* at 1223. At the same time, petitioners introduced enough scientific evidence—in light of compelling evidence of a "tipping point" for irreversible adverse climate changes—to pose a substantial question of the rule's potential for significant environmental degradation. *Id.* at 1221-22.

144. See Owen, *supra* note 8, at 86 ("No reasonable doubt exists that rising worldwide totals are already causing, and will continue to cause, severe and sometimes catastrophic consequences.").

145. CAL. PUB. RES. CODE §§ 21000-21177 (West 2007 & Supp. 2009).

146. Twenty-five states have NEPA-like statutes or executive orders in place, although several, including California's CEQA, have more substantive bite than their federal role model. See Kass, *supra* note 26, at 41.

147. Owen, *supra* note 8, at 86-87 (internal footnotes omitted); see also Wishnie, *supra* note 9, at 644 ("[S]traightforward application of cumulative impacts analysis could result in any federal project resulting in even the most minor emission of GHGs meeting the significance requirement"). Wishnie also notes, "Retaining the cumulative impacts requirement would create an unworkable burden for agencies" *Id.* at 646.

148. The Supreme Court foresaw the potential for such a cumulative impacts quandary in one of the early NEPA challenges before the courts. See *Kleepe v. Sierra Club*, 427 U.S. 390, 413-15 (1976); see also ECCLESTON, *supra* note 66, at 246-48 (identifying cumulative impact paradox where projects with small, even innocuous, incremental impacts on a resource trigger EIS

The consequences of *no-project-left-behind* are possibly as dire as those of *death-by-a-thousand-puffs*. If tens of thousands of yearly NEPA significance determinations that currently demand only EA preparation and result in findings of non-significance instead trigger full EIS preparation—due to the cumulative effects of GHG emissions—federal agencies will be burdened with a massive,¹⁴⁹ time¹⁵⁰ and resource consuming,¹⁵¹ costly¹⁵² documentation program. At least one court has opined (in a non-climate context) that such a burden could shut down government activity entirely:

Although the statute does not indicate how lengthy or detailed an environmental impact statement must be, and the required length and detail will of course vary with the nature of the proposed action whose impact is being studied, the implementing regulations require a formidable document. It will often be multi-volume and cost the government and the private applicant (if there is one, as there is here) hundreds of thousands of dollars to prepare; \$250,000 is the estimate in this case If such a statement were required for every proposed federal action that might affect the environment, federal governmental activity and the private activity dependent on it would pretty much grind to a halt.¹⁵³

Even if the burgeoning numbers of EISs failed to shut down government entirely, federal resources that could be put toward direct, substantive mitigation programs or adaptation measures to address climate disruption might instead be needed and allocated to satisfy the procedural elements of NEPA statement preparation. The resources allocated for detailed statements might also drain

preparation merely because the resource affected is one that has already suffered or will suffer a sustained significant cumulative impact as the result of past, present, and other reasonably foreseeable future activities).

149. CEQ reported in 1997 that of some 45,000 EAs carried out by federal agencies only 450 EIS resulted. *See* COUNCIL ON ENVTL. QUALITY, CONSIDERING CUMULATIVE EFFECTS, *supra* note 7, at 4; *see also* COUNCIL ON ENVTL. QUALITY, NATIONAL ENVIRONMENTAL POLICY ACT, *supra* note 18, at 19 (estimating annual EA preparation at about 50,000 per year). If each of these EA's instead triggered an EIS as a consequence of cumulative GHG impacts on climate, federal agencies would be saddled with preparing an incredible one hundred times as many detailed environmental statements.

150. *See* ECCLESTON, *supra* note 66, at 76 (Department of Energy reported an average EIS completion time of thirty months and Air Force estimated EIS completion times of “one or more years”).

151. *See* Wishnie, *supra* note 9, at 644 (predicting a “crippling administrative burden” if traditional cumulative analysis is applied in GHG context).

152. *See* ECCLESTON, *supra* note 66, at 77 (cost of preparing an EIS “typically ranges from a couple hundred thousand dollars to several million dollars” and in “extreme cases, the cost of preparing a very complex and controversial programmatic EIS can cost tens of millions of dollars”).

153. *River Rd. Alliance, Inc. v. U.S. Army Corps of Eng'rs*, 764 F.2d 445, 448-49 (7th Cir. 1985) (internal citations omitted).

agency resources from other important environmental projects, programs, or studies.¹⁵⁴ Further, NEPA—already demonized as a delay and paperwork statute¹⁵⁵—would be certain to create additional project delays due to the vastly increased documentation demands. Not only would such an outcome conflict with paperwork reduction and delay avoidance policies,¹⁵⁶ but would likely generate substantial political backlash and could lead to the weakening of NEPA itself.

The next Part offers options around this apparent NEPA climate bamboozler where GHG emissions of major federal actions appear too individually insignificant ever to trigger EIS review of global climate effects and simultaneously too cumulatively significant ever not to trigger EIS review of global climate effects.

III. DODGING THE THRESHOLD DETERMINATION BAMBOOZLER

Faced with this seemingly irreconcilable regulatory conundrum, a critical NEPA question becomes how to avoid the highly undesirable, even heinous, policy outcomes of either *death-by-a-thousand-puffs* or *no-project-left-behind*. This section explores various options—interpretive, regulatory, and statutory—to compel NEPA findings of significance necessitating environmental review of climate impacts of some agency actions and yet avoid automatically triggering the costly, and perhaps administratively impossible, task of EIS preparation for every federal agency action.

A. Interpretive Fixes—*The Emperor NEPA's New Clothes*

NEPA's existing statutory and regulatory frameworks offer several options for dealing with the apparent NEPA climate paradox. First, contextual considerations may operate to make a federal action's GHG emissions significant, even though when viewed globally they appear insignificant or even indiscernible. Second, alternative significance factors already exist for triggering detailed review of seemingly minute GHG emissions (without resorting to cumulative impacts analysis) along with existing provisions for limiting unruly EIS proliferation. For these reasons, the cumulative impacts problem could turn out to be more of a run-of-the-mill NEPA problem rather than a unique GHG

154. Despite the current focus on global climate warming, there remain plenty of other critical environmental problems that deserve, and continue to need, federal attention. See generally Joel Achenbach, *Global Warming Did It! Well, Maybe Not*, WASH. POST, Aug. 3, 2008, at B01 (discussing other environmental problems that are not necessarily caused by warming).

155. See Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y. UNIV. ENVTL. L.J. 333, 341-43 (2004) (discussing skeptics' views of NEPA).

156. See 40 C.F.R. § 1500.1(c) (2008) ("NEPA's purpose is not to generate paperwork—even excellent paperwork—but to foster excellent action."); see also *id.* §§ 1500.2(b) (agencies must implement procedures to reduce paperwork), 1500.4 (providing regulations for reducing paperwork), 1500.5 (providing that agencies must reduce delay), 1501.1(a) (noting the purpose to eliminate delay), 1502.1 (outlining purpose of an EIS).

conundrum and dealt with accordingly.

1. *Triggering Climate Significance*.—Even relatively minute contributions to atmospheric GHG levels from routine federal actions will not necessarily preclude a finding of significance under NEPA (even without taking account of cumulative impacts). Contextual considerations and any one¹⁵⁷ of several NEPA intensity factors¹⁵⁸ may justify and demand a finding of significance under the particular circumstances.

NEPA regulations not only allow, but already require, accounting for *context* in significance determinations. According to CEQ, the significance of an action “must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interest, and the locality.”¹⁵⁹ For example, “[a] proposed power plant . . . might have a much greater impact on both the environment and human health if it is located in the middle of a large metropolitan area that already has substantial air quality problems, rather than if it is sited in a more remote area.”¹⁶⁰ These authorities make clear that temporal and spatial considerations have relevance in significance determinations.

With respect to climate, context may at first seem an unlikely or irrelevant trigger for a significance determination. The reason is that from a purely scientific perspective, GHG emission impacts on climate warming are the same regardless of where such emissions originate.¹⁶¹ As a consequence, federal actions with GHG contributions would not appear to have any site specific impacts triggering a local or regional determination of significance. And, if the global atmosphere serves as the relevant context, individual project contributions will no doubt seem trivial and insignificant as compared to planetary levels of GHG.¹⁶² This perspective, however, arguably fails to fully take into account important contextual considerations bundled up with climate change.

Shifting perspectives, federal action GHG emissions may have contextually significant geographic area impacts to the extent they impede or interfere with achievement of local, state, or regional GHG reduction initiatives, policies, or plans—even aspirational, unenforceable goals. Where state or local governments have identified carbon reduction goals or targets, federal actions proposed in those localities may adversely impact achievement of such goals. That is, the amount of GHG emitted in a certain locale may have a relatively substantial

157. See *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508, 553 (9th Cir. 2007) (action may be significant if one factor is met (citing *Ocean Advocates v. U.S. Army Corps. of Eng’rs*, 361 F.3d 1108, 1125 (9th Cir. 2004))), *vacated and superseded on denial of reh’g* by 538 F.3d 1172 (9th Cir. 2008) (retaining this proposition); *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 731 (9th Cir. 2001) (noting that “[e]ither of [the discussed] factors may be sufficient).

158. See 40 C.F.R. § 1508.27(b) (2008); see also *supra* notes 51-66 and accompanying text.

159. 40 C.F.R. § 1508.27(a) (2008).

160. ECCLESTON, *supra* note 66, at 157.

161. See Wishnie, *supra* note 9, at 640-41. (“[I]mpact on climate is the same if one hundred facilities all over the world emit one unit of CO₂, or one facility emits one hundred units.”).

162. See *supra* notes 4, 95-100 and accompanying text.

impact on that community or region's efforts to address climate change even if the very same amount is negligible relative to total global or national emissions. For example, in early 2007, Governor Gregoire of Washington State laid out state targets for reducing greenhouse gases in the form of a "Climate Change Challenge."¹⁶³ Analyzed in the context of Washington's climate targets, a federal action with GHG emissions—to be located or take effect in Washington State—could have a sizeable impact on the State's ability to achieve its reduction goals. If significantly large, the federal proposal's impact on the State goals would trigger EIS preparation as a contextual matter. Similar situations exist in other areas of the nation. For example, Massachusetts enacted a Global Warming Solutions Act¹⁶⁴ in 2008 that calls for setting a statewide GHG limit to be achieved by 2020¹⁶⁵ but does not call for adoption of GHG reduction measures until January 2011.¹⁶⁶ In the interim, federal project GHG emissions will effect the State's ability to achieve its 2020 goal.

Pursuing this argument one step further, climate triggered significance determinations become even more likely in the context of local government efforts to address climate change. Federal actions GHG emissions evaluated in the context of climate targets put in place by even smaller governmental units—say for example by the City of Seattle¹⁶⁷—seem even more likely to

163. See Wash. Exec. Order No. 07-02, Washington Climate Change Challenge (Feb. 2007), available at http://www.governor.wa.gov/execorders/eo_07-02.pdf. The Governor's order identified specific reduction targets and deadlines, but left to the state agencies the task of fleshing out specific actions and strategies needed to achieve these goals. *Id.* Specifically, the executive order established the following greenhouse gas emissions reduction and clean energy economy goals for Washington State:

- By 2020, reduce greenhouse gas emissions in the state of Washington to 1990 levels, a reduction of 10 million metric tons below 2004 emissions;
- By 2035, reduce greenhouse gas emissions in the state of Washington to 25% below 1990 levels, a reduction of 30 million metric tons below 2004;
- By 2050, the state of Washington will do its part to reach global climate stabilization levels by reducing emissions to 50% below 1990 levels or 70% below our expected emissions that year, an absolute reduction in emissions of nearly 50 million metric tons below 2004;
- By 2020, increase the number of clean energy sector jobs to 25,000 from the 8,400 jobs we had in 2004; and
- By 2020, reduce expenditures by 20% on fuel imported into the state by developing Washington resources and supporting efficient energy use.

Id.

164. 2008 Mass. Acts ch. 298 (to be codified at MASS. GEN. LAWS ANN. ch. 21N (Supp. 2009)).

165. *Id.* § 6 (codified at MASS. GEN. LAWS ANN. ch. 21N, § 4(a) (Supp. 2009)). The State Department of Environmental Protection must establish the "statewide greenhouse gas emissions limit . . . between 10 per cent and 20 per cent below the 1990 emissions level."

166. *Id.* § 17.

167. In 2005, Seattle's Mayor launched a "Climate Protection Initiative." See Seattle Climate

trigger contextual climate determinations of significance than regional or statewide initiatives (as a consequence of their proportionally larger share of a much smaller GHG emissions pie and many fewer emitters to share the reduction burden). Also, it should at least be noted that in contrast to climate change impacts *of* federal projects, climate change impacts *on* federal projects can have site specific impacts for contextual analysis.¹⁶⁸

In addition to *contextual* considerations, certain regulatory *intensity* factors present options for triggering climate-based threshold determinations independently of a cumulative impacts rationale. These particular factors¹⁶⁹ require consideration of highly controversial and uncertain risks,¹⁷⁰ precedent setting actions,¹⁷¹ related actions,¹⁷² and threatened violations of other environmental laws.¹⁷³ Frustratingly, these factors often seem to run into the same muddy waters as cumulative impacts analysis: the triggering of EIS preparation for every, or almost every, agency proposal.¹⁷⁴

First, federal agencies ordinarily¹⁷⁵ need to prepare an impact statement when the environmental effects of proposed agency action are “highly uncertain or

Action Now, <http://www.seattlecan.org/about/CPI.html> (last visited Jan. 23, 2009) (The initiative pledges that the city—“the entire community not just City government”—would reduce greenhouse gas emissions to seven percent below 1990 levels by 2012).

168. For example, rising temperatures will affect specific projects in specific locations differently, including to a greater or lesser degree. Federal agencies proposing projects in coastal areas may need to consider rising tides, more frequent hurricane events, and other climate related wet weather events to a greater extent than proposals to be located in other areas to fully analyze the environmental impacts of project construction and operation. Similarly, agency projects to be located in historically dry regions may need to consider site specific drought and fire related impacts of climate change as part of their NEPA review. See 40 C.F.R. § 1508.27(b) (2008) (listing intensity factors).

169. Several other intensity factors are relevant, but pose the same difficulty as the basic quantitative effects analysis discussed *supra* notes 154-56 and accompanying text. Factors taking into account the degree a proposed action affects public health or safety, unique land or resource characteristics or historic sites, run up against the too small to be significant problem because they all focus on quantitative analysis of proposed emissions. See 40 C.F.R. §§ 1508.27(b)(1)-(3) (2008).

170. See 40 C.F.R. §§ 1508.27(b)(4) & (5) (2008).

171. See *id.* § 1508.27(b)(6).

172. See *id.* § 1508.27(b)(7).

173. See *id.* § 1508.27(b)(10).

174. For discussion of limit setting solutions to this excessive determination of significance problem, see *infra* Part III.A.2.

175. The “ordinarily” required language takes into account a jurisdictional split as to whether the intensity categories mandate EIS preparation or serve as authoritative guidelines. Compare Seattle Cmty. Council Fed’n v. Fed. Aviation Admin., 961 F.2d 829, 831 (9th Cir. 1992) (noting that the NEPA mandates EIS), with Comm. to Pres. Boomer Lake Park v. Dep’t of Transp., 4 F.3d 1543 (10th Cir. 1993) (noting that EIS not mandated).

involve unique or unknown risks”¹⁷⁶ or “likely to be highly controversial.”¹⁷⁷ Although the likelihood of some climate related change due to GHG emissions appears certain—in the sense that warming is already occurring—the extent and precise form of the impacts remain both uncertain, unknown and yet to be determined—in part because of scientific limitations and in part because the concerted efforts required to avoid the harshest warming consequences and adapt to the likeliest climate scenarios have yet to be determined. Thus, proposals directly or indirectly contributing to GHGs are—and perhaps even epitomize—actions with associated uncertain or unknown environmental risks, specifically uncertain and unknown risks to weather, flooding, species, human health, and climate. Moreover, while the effect of GHG emissions on climate is far from unique to any particular proposal, and rather unexceptional in its common, constant, and additive relationship with climate disruption, the predicted effects of global climate change are unprecedented in human history, exceptional in enormity of scope, singular in their capacity for human disruption, and so uniquely risky.

A number of courts construe the “highly controversial” intensity factor in a manner akin to the uncertainty factor.¹⁷⁸ Accordingly, a “controversy” becomes a NEPA significance trigger where the identified impacts are subject to debate in the scientific community (due to technical, methodology, or data disputes) as opposed to controversy in the public sphere (e.g., vocal local community opposition or sensitivity to a proposed action).¹⁷⁹ Climate effects generate controversial federal actions. Despite scientific consensus of a global warming phenomenon,¹⁸⁰ there remains significant scientific debate concerning the temporal and regional ramifications of warming, the extent of those ramifications on the quality of the human environment, the link between specific emissions and climate effects, and perhaps most importantly the level and pace of the U.S. GHG reduction effort needed to ward off, delay or reduce significant climate disruption.¹⁸¹ Thus, every major federal action with direct or indirect GHG emissions conceivably raises “highly controversial” questions of scientific debate of major significance to the health of the human environment because it is

176. See *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731-32 (9th Cir. 2001) (citing *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998)); see also 40 C.F.R. 1508.27(b)(5) (2008).

177. See 40 C.F.R. § 1508.27(b)(4) (2008).

178. See, e.g., *Found. for N. Am. Wild Sheep v. U.S. Dep't of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982); *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973).

179. See *Found. for N. Am. Wild Sheep*, 681 F.2d at 1182 (“[T]erm ‘controversial’ refers ‘to cases where a substantial dispute exists as to its size, nature, or effect of the major federal action rather than to the existence of opposition to a use.’” (quoting *Rucker*, 484 F.2d at 162)); Mandelker, *supra* note 10, § 8:47 (citing dozens of cases holding public opposition insufficient to trigger EIS); but see *Babbitt*, 241 F.3d at 736-37 (taking into account “outpouring of public protest”).

180. See IPCC, *supra* note 24, at 2; see also *supra* notes 82-90 and accompanying text.

181. See IPCC, *supra* note 24, at 3, 19-20 (noting only “high” or “medium” confidence as to these issues).

scientifically debatable whether each federal action represents a critical opportunity to prevent or moderate climate warming effects of unknown but enormous magnitude.¹⁸² In practice, application of this significance trigger might require the corraling of comments by climatologists, biologists, conservationists, or other environmental experts in favor of EIS preparation on climate grounds.¹⁸³ Aside from this battle of experts hurdle, this intensity factor appears to solve the *death-of-a-thousand-puffs* problem. And yet, the quandary of *no-project-left-behind* remains. Applying this factor appears to result in an EIS for every federal action in which scientific support for a climate EIS can be brought to the attention of the lead agency.¹⁸⁴

Under the sixth intensity factor, precedent setting agency actions can trigger NEPA environmental review.¹⁸⁵ Consideration of project and program GHG emissions may very well fall within this category of EIS triggering actions. At least one court has found that decisions with the potential to influence the outcome of future decisions at home or abroad qualify as precedent setting.¹⁸⁶ With respect to climate, the initial NEPA decisions analyzing GHG emissions have the potential not only to set the future model for all future federal agency review decisions, but also for many state agency actions subject to state environmental assessment requirements and an even greater number of foreign nations that have adopted environmental assessment laws following the United States' lead.¹⁸⁷ However, given the sluggish pace of federal action to address climate, as compared with several aggressive NEPA climate initiatives by state governments,¹⁸⁸ it seems as likely that state decisions will end up setting the precedent and direction of federal NEPA decisionmaking rather than vice-versa.¹⁸⁹ Interpreting factor six, the *Anderson* court also noted that an EIS may be required "[i]f approval of a single action will establish a precedent for other

182. See FAGRE ET AL., *supra* note 103, at 14 (predicting that even slight warming may push ecosystems across thresholds that would render restoration extremely difficult or impossible).

183. See *Found. for N. Am. Wild Sheep*, 681 F.2d at 1182 (collecting comments from scientists in discussing the significance trigger).

184. For discussion of limit setting solutions to this excessive determination of significance problem, see *infra* Part III.A.2.

185. See 40 C.F.R. § 1508.27(b)(6) (2008).

186. See *Anderson v. Evans*, 371 F.3d 475, 493 (9th Cir. 2004) (finding potential for precedential impact because decision could be used by other countries to approve similar actions); see also Mandelker, *supra* note 10, § 8:35.1 ("The general rule appears to be that the failure to prepare an impact statement is precedential if the agency or other decision makers would be able to rely on this decision to make the same decision in future actions.").

187. Some eighty nations have followed the lead of the United States by enacting environmental assessment laws. See COUNCIL ON ENVIRONMENTAL QUALITY, THE NATIONAL ENVIRONMENTAL POLICY ACT, *supra* note 18, at 3. In a similar vein, Lauren Giles Wishnie argues that if Congress were to amend NEPA to explicitly require GHG analysis, the federal government could set a powerful precedent for state and foreign nations. See Wishnie, *supra* note 9, at 652.

188. See Kass, *supra* note 26, at 41.

189. *Id.* at 42.

actions which may cumulatively have a negative impact on the environment.”¹⁹⁰ The now obvious cumulative nature of GHG emissions,¹⁹¹ in combination with the global rather than localized effects of GHG emissions,¹⁹² the mounting urgency to act to avoid or stall global warming, and the increasing calls for NEPA review of climate in the environmental review process, bestow a precedent setting quality to early attempts to address climate under NEPA. Although many (or perhaps even most) of the underlying federal actions are so run-of-the-mill as to seem anything but precedent setting (e.g., commercial development, construction projects, and routine rulemakings), the current state of the environment—with increasing climate warming levels of atmospheric GHGs—effectively transforms otherwise mundane federal decisions into important precedent setting decisions. Nevertheless, as with the intensity factors discussed so far, this triggering factor potentially runs amok by virtue of its seemingly non-selective triggering of the EIS requirement for all agency reviews initially taking into account climate.¹⁹³

Last, but not least in importance, federal agencies need to consider whether their proposed action “threatens a violation of a Federal, State or local” environmental law.¹⁹⁴ Proposals anticipated to exceed non-NEPA environmental regulatory standards typically trigger EIS preparation.¹⁹⁵ This “other laws” factor might also trigger EIS preparation in situations where a proposal implicates a substantive environmental law but is *not* expected to violate such law.¹⁹⁶ First, relevant environmental standards may be set higher than the point of significance

190. *Anderson*, 371 F.3d at 493.

191. *See supra* Part II.B.2.

192. The pure additive nature of anthropogenic GHG emissions to atmospheric accumulation of GHG emissions responsible for global warming set repetitive project emissions apart from situations involving repetitive or similar proposals with variable site specific impacts. In the latter situation, some courts have refused to find precedent setting actions. *See, e.g.,* *Surfrider Found. v. Dalton*, 989 F. Supp. 1309, 1325 (S.D. Cal. 1998) (noting that given the site specific nature of project impacts leads to no precedential impact necessitating EIS).

Although GHG contributions to the atmosphere emitted anywhere in the world all have equal and equivalent impact on global climate change, rising temperatures associated with global climate change may result in different, site specific adverse environmental impacts (e.g., predicted flooding in some regions but anticipated drought in others).

193. For discussion of limit setting solutions to this excessive determination of significance problem, see *infra* Part III.A.2.

194. 40 C.F.R. § 1508.27(b)(10) (2008).

195. *See ECCLESTON, supra* note 66, at 157. As suggested by the word “threatens,” a determination of significance also may be called for in situations where some evidence exists that an agency action might exceed other laws. *See Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir.1988). In addition, agency proposals *not* expected to violate relevant environmental laws may also trigger EIS preparation. *ECCLESTON, supra* note 66, at 158. A common misconception held by decisionmakers and consultants “is that no significant impacts will occur as long as a project complies with all applicable environmental laws and regulations.” *Id.*

196. *ECCLESTON, supra* note 66, at 158.

required for a NEPA EIS. For example, project emissions adjacent to a retirement community or discharges at a site with unique habitat features may have site specific and contextual significance without exceeding applicable emission or discharge standards.¹⁹⁷ Alternatively, absent a violation of any individual law, a collection of marginal or moderate impacts to various substantive environmental standards conceivably push a proposal past the significance threshold. In these situations, multiple, marginal environmental impacts collectively add up to a significant impact even if each alone does not breach applicable legal standards.¹⁹⁸ In this scenario individual impacts may be considered non-significant (as a consequence of falling below regulatory levels) but the impacts may be collectively significant (e.g., so many pollutant emissions near regulatory levels creates significant impact on air quality).¹⁹⁹

“Factor ten” considerations offer an alternative trigger for NEPA climate review. First, although no comprehensive federal climate change legislation exists as yet, if Congress enacts such legislation²⁰⁰ it will by definition become an “other environmental law” for purposes of NEPA review. With enactment of national climate legislation calling for mandatory GHG caps, GHG reduction goals, or even merely GHG reporting and monitoring, NEPA and climate will be married in a markedly new way. Anticipated GHG emissions of a major federal action exceeding the apportioned GHG limits or reporting quantities, hindering efforts to achieve the national climate goals, or threatening any of these scenarios seem likely to trigger significance determinations. Even without Congressional action, the U.S. Environmental Protection Agency (EPA) seems certain to regulate carbon dioxide (an important GHG) at some point in the not-too-distant future with similar NEPA climate implications.²⁰¹

197. Environmental Petitioners raised this argument in a NEPA challenge against the U.S. Forest Service, but the court rejected the position as inapplicable based on the facts in dispute. *Env'tl. Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1198 (N.D. Cal. 2004) (holding for petitioners on other grounds).

198. See ECCLESTON, *supra* note 66, at 159-60, Table 6.6 (identifying the “Multiple Nonsignificant Impacts” significance factor).

199. *Id.* at 160, Table 6.6, ¶ 1.

200. Congressional and administrative support for national climate legislation seems to be building and legislation is likely to pass in the next several years. See Darren Samuelsohn, *Dems Take Separate Paths in Writing Renewable Energy, Cap-and-Trade Bills*, ENV'T & ENERGY DAILY (Feb. 11, 2009) (“Cap-and-trade legislation hit a high-water mark in the Senate with 43 votes in 2003, though a procedural vote last summer on global warming garnered 48 supporters, Senate sponsors hope to reach 60 [in 2009] . . . with help from the Obama administration and a coalition of moderate Democrats and Republicans.”); see also Darren Samuelsohn, *Markey's New Subcommittee Examines Warming's Effects on Security, Health, Economy*, ENV'T & ENERGY DAILY (Feb. 9, 2009) (discussing efforts to pass climate change legislation in 2009).

201. In July 2008, EPA published an Advance Notice of Proposed Rulemaking (ANPR) providing information and requesting public comment on the Supreme Court's ruling in *Massachusetts v. EPA*, 549 U.S. 497 (2007), that the Clean Air Act regulates GHG emissions, but failed to include an endangerment finding called for by the Court's decision. See generally

Even in the absence of national climate legislation and EPA carbon regulation, state and local governments have already put in place climate protection laws and policies implicating NEPA factor ten triggers. Examples include the Global Warming Solutions Acts enacted in California and Massachusetts;²⁰² regional efforts including the Western Climate Initiative (WCI),²⁰³ the Midwestern Greenhouse Gas Reduction Accord (Accord),²⁰⁴ and the Northeastern and Mid-Atlantic Regional Greenhouse Gas Initiative (RGGI);²⁰⁵ and local government initiatives such as the U.S. Conference of Mayors' Climate Protection Agreement,²⁰⁶ the City of Seattle's Greenhouse Gas Assessment Ordinance,²⁰⁷ and King County's Climate Action Plan.²⁰⁸ Federal action GHG

Regulatory Greenhouse Gas Emissions Under the Clean Air Act, 73 Fed. Reg. 44,354 (July 30, 2008). Although the ANPR appeared to be a delaying tactic to avoid a carbon dioxide rulemaking until after the November 2008 election, it seems unlikely EPA can avoid complying with the Supreme Court's decision indefinitely and, under the direction of the Obama Administration, appears readying to take action in 2009. See John M. Broder, *E.P.A. Expected to Regulate Carbon Dioxide*, N.Y. TIMES, Feb. 19, 2009, at A15; Juliet Eilperin & R. Jeffrey Smith, *EPA Won't Act on Emissions This Year*, WASH. POST, July 11, 2008, at A01; Katherine Boyle, *EPA to Leave GHG Regs to Next Administration*, GREENWIRE (July 11, 2008), available at www.greenwire.com.

202. California Global Warming Solutions Act of 2006, CAL. HEALTH & SAFETY CODE §§ 38500-38599 (West 2006 & Supp. 2009); Climate Protection and Green Economy Act of 2008, MASS. GEN. LAWS ANN. ch. 21N, §§ 1-9 (Supp. 2009).

203. Western Climate Initiative (WCI), <http://www.westernclimateinitiative.org/> (last visited Jan. 26, 2009). The WCI is a joint effort of mostly Western states and provinces established to develop regional strategies to address climate change. *Id.* Current WCI partners include Arizona, British Columbia, California, Manitoba, Montana, New Mexico, Ontario, Oregon, Quebec, Utah, and Washington. *Id.*

204. Midwestern Regional Greenhouse Gas Reduction Accord, Nov. 15, 2007, available at <http://www.midwesternaccord.org/midwesterngreenhousegasreductionaccord.pdf> [hereinafter Midwest Accord]. On November 15, 2007, five states (Iowa, Kansas, Michigan, Minnesota, Wisconsin), along with one Canadian province, entered the Accord. See *id.*; see also Midwest Greenhouse Gas Reduction Accord, <http://www.midwestacord.org/> (last visited Jan. 26, 2009). Under the Accord, the signatories agreed to establish regional greenhouse gas reduction targets, develop a multi-sector cap-and-trade system, implement a greenhouse gas emissions reductions tracking system, and adopt other policies to aid in reducing emissions. Midwest Accord, *supra*, at 3-4.

205. Regional Greenhouse Gas Initiative (RGGI), <http://www.rggi.org/home> (last visited Jan. 26, 2009). RGGI is a cooperative effort of Northeast and Mid-Atlantic States to reduce carbon dioxide emissions from power plants in the region. *Id.* Signatories to RGGI's climate protection Memorandum of Understanding include Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. *Id.* (follow "Participating States" link).

206. U.S. Conference of Mayors' Climate Protection Agreement, Mayors' Climate Protection Ctr., <http://www.usmayors.org/climateprotection/agreement.htm> (last visited Jan. 26, 2009).

207. Seattle, Wash. Ordinance 122,610 (Dec. 21, 2007).

208. KING COUNTY, 2007 KING COUNTY CLIMATE PLAN 4 (2007), available at <http://www.kingcounty.gov/ClimatePlan/ClimatePlan4.pdf>.

emissions that exceed such regional, state, or local GHG limits or reporting quantities; hinder efforts to achieve relevant regional, state, or local climate goals; or threaten the possibility of either scenario, call out for significance determinations.

Even without an actual or threatened violation of a new climate protection law, GHG emissions, in combination with other marginal or moderate impacts (similarly falling below legal standards), might combine to push an agency proposal across the significance threshold in any region, state, or locality subject to a climate protection initiative. Additionally, unlike the intensity factor analyses discussed previously, factor ten does not necessarily raise the *no-project-left-behind* concern. Instead, the subject actions will turn on the substantive standards set out in the new climate protections.

One potential complicating factor, however, will be the effect of nonbinding goals and targets²⁰⁹ of various regional efforts, which presumably enjoy less weight in NEPA significance analysis than mandatory regulatory standards.²¹⁰ A second difficulty arises in the transition period during which regulatory agencies flesh out new climate protection legal authorities (e.g., How does a regional cap serve as a NEPA factor where the implementing authority has yet to set the cap? Or, where a legislative cap exists, how does a state or region-wide cap serve as a NEPA factor where the implementing authority has yet to determine sector or individual project allotments to allow for evaluation of exceedences?). Nevertheless, federal proposals with GHG emissions are more likely to appear significant in comparison to regional, state, or local caps and goals than when compared to worldwide emission levels.

2. *Limiting Climate Significance Determinations.*—Finding legal authority to compel NEPA findings of significance for climate impacts accomplishes only a partial solution to NEPA's climate threshold paradox. Finding NEPA authorities to avoid automatically triggering the EIS requirement for every federal agency action with GHG emissions is needed to untie the knot fully. This section sets out several options and combinations of options for limiting climate significance determinations.

a. *The climate mitigated FONSI.*—One option relies on the application of mitigation measures to limit climate determinations of significance. As interpreted by the courts, and in some circumstances CEQ, NEPA already allows for application of mitigation measures²¹¹ to reduce significant environmental

metrokc.gov/exec/news/2007/pdf/ClimatePlan.pdf (calling for an 80% reduction in countywide GHG emissions by 2050). See also King County, Wash., Exec. Order No. PUT 7-10-1 (Oct. 15, 2007) (empowering county departments to evaluate the climate impacts of their actions).

209. For a discussion of the contextual implications of such nonbinding goals and targets, see *supra* notes 161-66 and accompanying text.

210. The NEPA regulation calls for consideration of other environmental “law” or “requirements” as opposed to other environmental policies, plans, or good intentions. See 40 C.F.R. § 1508.27(b)(10) (2008).

211. NEPA regulations define “mitigation” to include measures that avoid, minimize, rectify, reduce, eliminate, or compensate for identified impacts. 40 C.F.R. § 1508.20 (2008).

impacts of a proposed action to the point of non-significance.²¹² In situations where a proposal incorporates sufficient mitigation measures to reduce anticipated impacts below the significance threshold—referred to as mitigated FONSI²¹³—a NEPA EIS need not be prepared.²¹⁴

In the same manner, climate-specific mitigation measures that reduce or offset a proposal's net GHG emissions to zero²¹⁵ can reduce significant climate environmental impacts to the point of non-significance.²¹⁶ Many climate mitigation measures and strategies already exist,²¹⁷ as do options for purchasing offsets²¹⁸ for GHG emissions. State regulators in California and Massachusetts have already developed rather extensive lists of climate mitigation measures available for addressing climate impacts associated with various state actions.²¹⁹

212. For federal decisions approving this practice, see generally *Spiller v. White*, 352 F.3d 235 (5th Cir. 2003); *Greenpeace Action v. Franklin*, 14 F.3d 1324 (9th Cir. 1992); *Audubon Society of Central Arkansas v. Dailey*, 977 F.2d 428 (8th Cir. 1992); *Roanoke River Basin Ass'n v. Hudson*, 940 F.2d 58 (4th Cir. 1991); *C.A.R.E. Now, Inc. v. Federal Aviation Administration*, 844 F.2d 1569 (11th Cir. 1988). For an extensive listing of decisions relying on mitigation measures to hold that federal actions did not require an EIS, see Mandelker, *supra* note 10, § 8:57 n.16.

In addition, CEQ guidance suggests that mitigation measures either in an original proposal or mandated by law can support an agency finding of non-significant impact. See Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18,026, 18,038 (1981) (answering question forty). Although initially taking the position that other mitigation measures could not be so relied on, CEQ seems to have moved away from this position. See Mandelker, *supra* note 10, § 8:57.

213. Federal agencies document determinations that an EIS is not required in a "Finding of no significant impact" (FONSI). See 40 C.F.R. § 1508.13 (2008).

214. See *supra* note 48 and accompanying text.

215. An "above zero" mitigation level could apply if regulators combine the mitigation option with other options described below for limiting significance determinations. See *infra* Part III.B.1 (threshold options) and Part III.B.3 (categorical exception option).

216. Depending on the situation, the proponent might alternatively, or additionally, need to incorporate mitigation measures to avoid or offset project-related GHG sink reductions (e.g., in the case of a major federal action proposing timber cutting and harvesting).

217. See IPCC, *supra* note 24, at 14-18.

218. Offsets allow proponents to neutralize the carbon dioxide anticipated to be produced from their proposals by financially supporting a variety of ongoing emission-reducing initiatives. For examples of currently available carbon offsets, see *infra* notes 223-26 and accompanying text.

219. See CALIFORNIA GOVERNOR'S OFFICE OF PLANNING AND RESEARCH, *supra* note 31, at 18 (listing over thirty examples of GHG reduction measures); MASSACHUSETTS EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS (MEEA), (REVISED) MEPA GREENHOUSE GAS EMISSIONS POLICY AND PROTOCOL 9-10 (effective Feb. 3, 2009), available at <http://www.mass.gov/envir/mepa/downloads/GHGPolicyRev/108.pdf> [hereinafter MEEA, MEPA POLICY] (listing over fifty "Suggested Mitigation Measures" for GHG emissions associated with siting and site design, building design and operation, and transportation); see also THOLEN ET AL., *supra* note 97, at app. B (listing mitigation strategies relating to energy efficiency, transportation, construction, land use, development, building design, and public education); IPCC, *supra* note 24, at 14-18 (discussing

Similarly, advisory groups in New York and Washington have compiled lists of mitigation options.²²⁰

Identified mitigation measures range from suggestions for building design,²²¹ to strategies for energy conservation, to options for transit and transportation planning, to other GHG reducing measures.²²² At the same time, a number of private entities (including not for profit organizations) currently offer for sale carbon offsets to individuals and businesses.²²³ Through such purchases,

mitigation and adaptation measures).

220. See KATIE KENDALL, THE MUNICIPAL ART SOCIETY OF NEW YORK, SEQRA AND CLIMATE CHANGE app. B 35 (Working Draft July 2008) (“Suggested Mitigation Measures”); WASH. STATE ENVTL. POLICY ACT (SEPA) IMPLEMENTATION WORKING GROUP (IWG), FINAL DRAFT: SEPA MITIGATION STRATEGIES FOR CLIMATE CHANGE IMPACTS (Oct. 2008), *available at* http://www.ecy.wa.gov/climatechange/2008CATdocs/IWG/sepa/102108_revised_sepa_mitigation_table.pdf [hereinafter SEPA IWG].

221. For example, the Massachusetts Greenhouse Gas Emissions Policy and Protocol lists the following building design and operation mitigation strategies:

Construct green roofs; use high-albedo roofing materials; install high-efficiency HVAC systems; eliminate or reduce use of refrigerants in HVAC systems; reduce energy demand using peak shaving or load shifting strategies; maximize interior daylighting through floor plates, increased building perimeter and use of skylights, celestories, and light wells; incorporate window glazing to balance and optimize daylighting, heat loss, and solar heat gain performance; incorporate superinsulation to minimize heat loss; incorporate motion sensors and lighting and climate control; use efficient, directed exterior lighting; incorporate on-site renewable energy sources into projects including solar, wind, geothermal, low-impact hydro, biomass, and bio-gas strategies; incorporate combined heat and power (CHP) technologies; use water-conserving fixtures that exceed building code requirements; re-use gray water and/or collect and re-use rainwater; provide for storage and collection of recyclables (including paper, corrugated cardboard, glass, plastic, and metals) in building design; re-use building materials and products; use building materials with recycled content; use building materials that are extracted and/or manufactured within the region; use rapidly renewable building materials; use wood that is certified in accordance with the Forestry Stewardship Council’s Principles and Criteria; use low-VOC adhesives, sealants, paints, carpets, and wood; conduct third-party building commissioning to ensure energy performance; track energy performance of building and develop strategy to maintain efficiency; provide construction and design guidelines to facilitate sustainable design for build-out by tenants; purchase Energy Star-rated appliances with the lowest energy rating.

MEEA, MEPA POLICY, *supra* note 219, at app. 9-10; *see also* THOLEN ET AL., *supra* note 97, at app. B 13-33 (listing mitigation strategies for construction, development, and building design).

222. The California white paper offers pages of “Mitigation Strategies” relating to energy efficiency, transit, transportation, land use, and public education. See THOLEN ET AL., *supra* note 97, at app. B 1-13, 31, 34-45; *see also* MEEA, MEPA POLICY, *supra* note 219, at 9-10

223. For example, individuals and companies may purchase carbon offsets from organizations including Carbonfund.org, TerraPass, e-BlueHorizons, Sterling Planet, GreenLife, 3Degrees, and Renewable Choice Energy. See Environmental Defense Fund, The Carbon Offsets List, <http://>

interested entities may offset GHG emissions by helping to finance projects that capture and destroy methane emissions from landfills,²²⁴ provide energy from wind farms,²²⁵ or sequester carbon through reforestation.²²⁶

At least in theory, there seems to be no reason that proponents desiring to sidestep EIS preparation as a consequence of climate impacts could not embrace mitigation measures to avoid or offset their GHG emissions (or GHG sink modifications). This option encourages proponents of federal actions to incorporate global warming mitigation measures into their proposals and to think about climate change mitigation early on during project design. Small routine federal actions, with presumably trivial or very minor GHG contributions, should be most able to cost effectively mitigate GHG contributions and dodge the costs and delays associated with EIS preparation.²²⁷ Large actions, presumably with much more substantial GHG contributions, might have greater difficulty offsetting GHG contributions to zero, but are already likely to trigger EIS review in any case. In a sense, the Climate Mitigated FONSI option operates to internalize climate-protection costs into governmental agency actions (as an alternative to EIS preparation).

One concern with a Climate Mitigated FONSI approach relates to an existing NEPA Achilles' heel: the lack of post-NEPA review follow-through. Scholars have long criticized NEPA's lack of post-review monitoring of, and post-review enforcement against, proponents who promise mitigation during NEPA review but fail to carry out promised measures after project approval.²²⁸ Climate Mitigated FONSI would seem subject to similar post-review compliance problems. Thus, special care would need to be taken to ensure proponents actually implement promised climate-related mitigation measures.²²⁹

carbonoffsetlist.org (last visited Jan. 26, 2009).

224. See e.g., Renewable Choice Energy Upper Rock Choice Carbon Offsets, <http://www.renewablechoice.com/edf/> (last visited Jan. 26, 2009); e-BlueHorizon projects, at <http://org.e-bluehorizons.net/offset/> (last visited Jan. 26, 2009).

225. See, e.g., TerraPass, TerraPass Project Types, <http://www.terrapass.com/projects/clean-energy.html> (last visited Jan. 26, 2009).

226. See, e.g., The Conservation Fund, Louisiana, <http://www.conservationfund.org/southeast/louisiana> (last visited Jan. 26, 2009).

227. The reason being that relatively simple steps (e.g., tree planting, landscaping, or low cost energy conservation measures) can be used to mitigate a small project to a zero net emissions level without large upfront investment and may even generate cost savings over the long term.

228. See Alyson C. Flournoy et al., *Harnessing the Power of Information to Protect Our Public Natural Resource Legacy*, 86 TEX. L. REV. 1575, 1585 (2008) ("Postdecision monitoring is widely viewed as a critical missing component in NEPA practice."); Karkkainen, *supra* note 10, at 936 ("One crucial problem with mitigated FONSI is that NEPA itself does not clearly require that the promised mitigation measures actually be implemented, and CEQ guidance on the subject has been interpreted by the courts as nonbinding."); see also Dinah Bear, *Some Modest Suggestions for Improving Implementation of the National Environmental Policy Act*, 43 NAT. RESOURCES J. 931, 941-49 (2003) (proposing post-decision monitoring).

229. Concerns about post-decision follow-through might be ameliorated by conditioning

As a practical matter, various unknowns may also affect the viability of this option, including the actual cost of climate mitigation measures, effective demonstration of necessary reductions, and assumptions about the relationship between project size and GHG emissions. Offsetting every small project or program GHG emissions to zero might turn out to be prohibitively expensive and lead to the very same cost problems as requiring EIS preparation for every proposal.²³⁰ It may also turn out that not all small federal actions have little, easily mitigated GHG contributions.²³¹ If so, many proposals that ordinarily would proceed without an EIS would be faced with either incorporating substantial mitigation or preparing a detailed statement.²³² Another concern is that even if mitigating GHG emissions to zero turns out to be feasible from a cost perspective, providing a persuasive demonstration of adequate mitigation may end up being impossible or infeasible.²³³ If not prohibitively expensive or undemonstrable, mitigation to zero may still turn out not to be the most efficient or effective policy approach for curbing GHG emissions.²³⁴ For these reasons, a Climate Mitigated FONSI approach could be a problematic solution, or at least an incomplete solution in certain circumstances.

Overall, given the many identified options for GHG mitigation, existing and developing methods for calculating and measuring GHG emissions, and the currently low cost of purchased offsets,²³⁵ it seems premature to rule out the

issuance of the Climate Mitigated FONSI on inclusion of identical climate mitigation conditions in the underlying permit, approval, or funding mechanism. Currently, following EIS preparation, agencies may provide for monitoring and other measures to assure compliance with promised mitigation identified in the EIS and final decision. *See* 40 C.F.R. § 1505.3(c) (2008). Similar conditions seem equally appropriate for mitigation measures contained in an EA leading to a FONSI.

230. At the 2008 ABA Environment, Energy, and Resources Law Summit: 16th Section Fall Meeting in Phoenix, Arizona, panelists discussing NEPA litigation issues briefly debated the practicalities of actually mitigating project GHG emissions to zero. NEPA Litigation Panel Discussion at the ABA Env't, Energy, and Resource Law Summit: 16th Section Fall Meeting (Sept. 18, 2008) [hereinafter ABA Summit]. Attorney panelist Alicia C. Guerra opined that this option would likely be impracticable from a cost perspective, whereas the panel moderator, Nicholas C. Yost, suggested otherwise, noting the current availability of very reasonably priced cost carbon offsets. *Id.*

231. *See* ECCLESTON, *supra* note 66, at 78 (“Some relatively small proposals can be much more complex or controversial than large projects” and “can substantially affect the cost and time required to comply with NEPA.”).

232. Combining this option with a categorical exclusions approach might eliminate this concern. *See infra* Part III.B.3 (discussing the categorical exclusions option).

233. Panelist Guerra raised this concern during the NEPA Litigation panel at the ABA Summit. ABA Summit, *supra* note 230.

234. NEPA regulatory tools must be considered in the much larger overall context of the fundamental policy transformation required to address global climate change.

235. The retail price of carbon offsets sold for as low as four dollars per ton in 2006, whereas the cost of EIS preparation ranges from in the hundred of thousands to several million dollars.

Climate Mitigated FONSI approach as a solution to the significance paradox.

b. Tiered climate analyses.—Tackling NEPA climate review at the programmatic or planning level offers another option for side-stepping the problem of *no-project-left-behind*. By “tiering”²³⁶ environmental review—consolidating climate impact review for groups of similar actions or geographically-related actions in a single broader scoped EIS—the number of individual project EISs can be reduced. NEPA regulations not only provide for such tiered reviews, but expressly encourage them.²³⁷

A tiered threshold approach has the benefit of allowing analysis of groups of related, similar, or co-located actions, with larger scale GHG emissions, at an earlier stage of decisionmaking. Unlike many situations where the lack of site-specific information limits the usefulness of tiered analysis, GHG emissions seem particularly suited for higher tier analysis because climate impacts tend to be relatively site-independent.²³⁸ By analyzing climate impacts at a higher

Compare Michael Vandenberg & Anne Steineman, *The Carbon Neutral Individual*, 82 N.Y. UNIV. L. REV. 1673, 1721 (2007) (carbon offset costs), *with* ECCELESTON, *supra* note 66, at 78 (EIS preparation costs); *see also* Laurie A. Ristino, *It's Not Easy Being Green: Reflections on the American Carbon Offset Market*, SUSTAIN. DEV. LAW & POL'Y (Winter 2008) (“[H]igh quality offset projects can play a role in the near term to mitigate climate change by reducing net carbon emissions in a cost-effective manner.”).

236. As defined by CEQ NEPA regulations,

Tiering refers to the coverage of general matters in broader environmental impact statements (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basinwide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.

40 C.F.R. § 1508.28 (2008).

237. According the CEQ NEPA regulations,

Agencies are encouraged to tier their environmental impact statements to eliminate repetitive discussions of the same issues and to focus on the actual issues ripe for decision at each level of environmental review (§ 1508.28). Whenever a broad environmental impact statement has been prepared (such as a program or policy statement) and a subsequent statement or environmental assessment is then prepared on an action included within the entire program or policy . . . the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action.

Id. § 1502.20. Although NEPA itself does not address consolidated reviews, the Supreme Court has upheld the approach. *See* Kleppe v. Sierra Club, 427 U.S. 390, 414-15 (1976).

238. GHG emissions *wherever emitted* contribute to global atmospheric levels that in turn influence climate. Nevertheless, project GHG emissions analyses can have site-specific components. For example, differences in employee commute distances and transportation options for different site locations can alter GHG emissions estimates for similar projects. Also the analysis of climate change *on* individual project proposals—a separate but important issue—will likely require site-specific analyses.

programmatic, policy, or landscape tier, the lower tier projects may avoid preparing individual EISs that would only re-evaluate previously identified climate impacts.²³⁹ This approach offers some relief to individual project review burdens, offers regulators a bigger picture perspective of climate challenges, and can be combined with other strategies for addressing global warming. Success, however, hinges on thoughtful and comprehensive advance planning efforts by federal and state governmental entities (e.g., comprehensive local land use planning).

c. *The “no-solution” solution—the climate EIS.*—Another response would be a “no-solution” solution. Starting from the assumption that global climate change must be taken seriously and taken seriously now, a position exists that *all* major federal actions with GHG emissions should be subject to a NEPA EIS requirement to quantify their emissions, identify climate-related mitigations measures, and consider less climate-disrupting alternatives.

Agency officials in California recognized this possibility in interim guidance for CEQA²⁴⁰ on climate integration.²⁴¹ Following passage of the California Global Warming Solutions Act of 2006, a cluster of cases litigating CEQA climate review, and pressure from the state’s attorney general, the California legislature marked GHG emissions as within the parameters of CEQA by requiring development of CEQA guidelines for the mitigation of GHG effects by January 2010.²⁴² In January 2008, the California Air Pollution Control Officers Association (CAPCOA) issued a white paper as an interim “resource for local policy and decision makers” for integrating climate concerns into CEQA reviews until adoption of the statewide guidelines.²⁴³ In the white paper, CAPCOA considered three different thresholds: a “[n]o significance threshold for GHG emissions,” a “GHG emissions threshold set at zero,” and a “GHG threshold set at a non-zero level.”²⁴⁴ Under the “zero threshold” option, any project-related increase in GHG emissions would be viewed as contributing “considerably to climate change and therefore would be a significant impact” for triggering EIR (similar to EIS) preparation.²⁴⁵ California’s “zero threshold” option represents

239. California’s Technical Advisory on CEQA and Climate Change adopts an analogous approach for climate change significance determinations under California’s environmental review statute. See CALIFORNIA GOVERNOR’S OFFICE OF PLANNING AND RESEARCH, *supra* note 31, at 6 (“CEQA authorizes reliance on previously approved plans and mitigation programs that have adequately analyzed and mitigated GHG emissions to a less than significant level as a means to avoid or substantially reduce the cumulative impact of a project.”).

240. CAL. PUB. RES. CODE §§ 21000-21177 (West 2007 & Supp. 2009).

241. THOLEN ET AL., *supra* note 97, at 27-30.

242. See CAL. PUB. RES. CODE §§ 21083.05 & 21097 (West Supp. 2009); see also Gerrard, *Climate Change*, *supra* note 8, at 21-22; Kass, *supra* note 26, at 41-42.

243. THOLEN ET AL., *supra* note 97.

244. *Id.* at 2-3.

245. *Id.* at 27. Similarly, an expert advisory committee, convened by the Municipal Art Society in New York to examine environmental review of climate change under the New York State Environmental Quality Review Act (SEQRA), concluded that “GHG emissions should be treated

the “no-solution” solution.

Ideally, the “no-solution” solution need not leave federal agencies facing an intractable *no-project-left-behind* dilemma. For federal proposals with no significant non-climate impacts, preparation of an impact statement should be streamlined to climate concerns in accordance with NEPA’s regulatory requirement for succinct statements focusing on significant impacts.²⁴⁶ The result would be the issuance of what might be referred to as a “Climate EIS,” a detailed assessment focused exclusively on climate matters. This targeted, more pithy EIS complies with both NEPA’s informational objectives²⁴⁷ and policy mandate of “promot[ing] efforts which will prevent or eliminate damage to the environment and biosphere,”²⁴⁸ but without the same likelihood of bringing government to a halt as preparation of a traditional full-blown EIS for every federal action would. In a best case scenario, the Climate EIS data would be coordinated with and supplement national GHG data collection efforts.²⁴⁹ In a worst case scenario, the regulatory burden of Climate EIS preparation would force congressional attention to NEPA reform and/or climate protection legislation, neither of which would necessarily be a bad thing.

B. Regulatory Fixes—Teaching an Old NEPA Dog New Tricks

Another range of options relies on regulatory fixes to NEPA’s climate threshold paradox. CEQ has authority to make interpretive rules and issue NEPA guidance.²⁵⁰ In addition, NEPA and CEQ call on other federal agencies to adopt agency specific NEPA procedures.²⁵¹ Pursuant to these authorities, federal agencies have openings to pursue various regulatory options for tackling the NEPA climate significance conundrum.

1. *Climate Thresholds.*—One such regulatory fix involves the setting of climate significance thresholds. As with other NEPA climate matters, however,

as a non-threshold pollutant—meaning that any increase in greenhouse gas emissions above a zero-threshold will contribute to the adverse cumulative impact of global warming change.” KENDALL, *supra* note 220, at ii. The group’s working paper, however, also contains several specific recommendations for limiting EIS preparation due to climate effects. *See infra* notes 275-78 and accompanying text.

246. *See* 40 C.F.R. § 1502.1 (2008) (“Agencies shall focus on significant environmental issues . . .”).

247. *See supra* notes 15-23 and accompanying text.

248. 42 U.S.C. § 4321 (2000).

249. This notion comports with the informational objectives of NEPA. *See* Wishnie, *supra* note 9, at 648-51 (noting need for and benefits of national climate data repository).

250. *See* 42 U.S.C. § 4332 (2000); Exec. Order No. 11,514, 35 Fed. Reg. 4247 (Mar. 5, 1970), *as amended by* Exec. Order 11,991, 42 Fed. Reg. 26,967 (May 24, 1977) (providing authority to CEQ).

251. *See* 42 U.S.C. § 4332(2)(B) (2000); 40 C.F.R. § 1507.3 (2008); *see also* Exec. Order No. 11,514, 35 Fed. Reg. 4247 (Mar. 5, 1970) (directing Federal agencies to initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals).

the setting of thresholds poses perplexing choices for agency decisionmakers. Climate thresholds can be set based on various measures of significance, including numeric limits (tons of GHGs to be emitted), quotas (GHG emissions as a percentage of global, national, regional or local emissions), or some combination of methods. State and local climate related environmental review initiatives have several of these regulatory approaches under consideration or already in place.²⁵²

a. Quantitative GHG significance thresholds.—Quantitative GHG emissions thresholds offer a way around the problems of too few and too many climate-based significance determinations. In setting bright-line thresholds by way of numeric limits, regulators obtain review of significant GHG emitters while limiting the regulatory burden associated with review of less significant emitters. Washington and California State advisory groups are looking at setting of quantitative climate significance thresholds. One approach under consideration in Washington would derive quantitative climate significance thresholds from state or regionally adopted GHG emissions caps or targets.²⁵³ Another option would set numeric significance thresholds based on GHG reporting requirements under other climate protection laws.²⁵⁴

In either case, only state agency proposals with anticipated GHG emissions above the identified quantitative thresholds would trigger a detailed impact statement under the states' little-NEPA statute.²⁵⁵

California agency officials identified a similar approach in a white paper addressing climate and CEQA²⁵⁶ integration.²⁵⁷ Pursuant to one of several identified options, lead agencies would set thresholds *above zero* for GHG emissions based on existing thresholds, if any, or new rules, ordinances, or policies.²⁵⁸ Proposals with projected GHG emissions below the identified thresholds would be viewed as “not contribut[ing] substantially to the global GHG budget” and, therefore, not constitute a considerable contribution to cumulative impacts triggering a full blown environmental assessment.²⁵⁹

252. See, e.g., KENDALL, *supra* note 220, at ii (discussing threshold options for New York); THOLEN ET AL., *supra* note 97, at 2-3 (discussing three potential thresholds in California).

253. See, WASH. STATE ENVTL. POLICY ACT (SEPA) IMPLEMENTATION WORKING GROUP (IWG), REPORT TO THE CLIMATE ACTION TEAM 10, *available at* http://www.ecy.wa.gov/climatechange/2008CATdocs/IWG/sepa/103008_sepa_iwg_report.pdf. [hereinafter REPORT TO THE CLIMATE ACTION TEAM].

254. *Id.* at 11 (noting that currently no numeric threshold is yet required but that such threshold “would be ground-breaking”). Note, a closely related option under consideration establishes numeric GHG emission threshold ranges. *Id.*

255. New York State Environmental Quality Review Act (SEQRA), N.Y. ENVTL. CONSERV. LAW §§ 8-0101-0117 (McKinney 2005 & Supp. 2009); Washington State Environmental Policy Act (SEPA), WASH. REV. CODE ANN. §§ 43.21C.010 to -.914 (West 1998 & Supp. 2009).

256. CAL. PUB. RES. CODE §§ 21000-21177 (West 2007 & Supp. 2009).

257. THOLEN ET AL., *supra* note 97, at 2-3.

258. *Id.* at 17, 31-57.

259. *Id.* at 31.

Consistent with the white paper guidance, California regulators are specifically considering a multi-layered approach²⁶⁰ that includes numeric screening levels.²⁶¹ In California, as in Washington, only actions with anticipated GHG emissions above the regulatory established quantitative threshold could trigger climate analyses under the applicable state environmental review statute.²⁶²

Although CEQ has not yet moved in this direction, in certain respects the Ninth Circuit has embraced parameters for the setting of federal quantitative thresholds. In *Center for Biological Diversity v. National Highway Traffic Safety Administration*,²⁶³ the court forcefully rejected NHTSA's position that the estimated lifetime emissions of carbon dioxide associated with its federally proposed fuel economy standards²⁶⁴ failed to cross the significance threshold.²⁶⁵ In so ruling, the court implicitly set a presumptive quantitative ceiling. Based on this precedent, future federal proposals with similar or greater estimated lifetime carbon dioxide emission levels would seemingly also trigger EIS review (at least in the Ninth Circuit). Whether project emissions below the identified emission level also trigger EIS preparation remains an open question, awaiting further judicial clarification.

The quantitative threshold approaches combat the *death-by-a-thousand-puffs*

260. See Email from Norman F. Carlin, Partner, California Law Firm of Pillsbury Winthrop Stow Pittman LLP, to Michael B. Gerrard, Senior Counsel, Arnold & Porter LLP (Sept. 20, 2008, 17:30:44 PDT) (on file with author) [hereinafter Carlin Email]. Accordingly, if a proposal's GHG emissions come in below the numeric threshold, the climate impact would be found less than significant under CEQA, California's environmental review statute. *Id.* Note, actions with GHG emissions above the numeric threshold might yet avoid EIR review under another tier of the significance determination (e.g., a project above the threshold that provides offsets might also avoid EIR review). See DRAFT AQMD STAFF CEQA GREENHOUSE GAS SIGNIFICANCE THRESHOLD FLOW CHART (2008), available at <http://www.aqmd.gov/hb/2008/December/081231a.htm> (follow the "Attachments" link at bottom of page).

261. One screening level under consideration sets the significance threshold at 6500 metric tons per year carbon dioxide equivalents (6500 MT CO₂e). Carlin Email, *supra* note 260. This numeric limit appears to derive from an existing regulatory threshold for nitrogen oxides. *Id.*

262. See REPORT TO THE CLIMATE ACTION TEAM, *supra* note 253; see also *supra* notes 253-54 and accompanying text.

263. 538 F.3d 1172 (9th Cir. 2008).

264. According to the Federal Highway Traffic Safety Administration's draft EA, estimated lifetime emissions of CO₂ for the proposal ranged from a baseline of 1341.4 million metric tons (mmt) to 1306.4 mmt and 1304.0 mmt respectively under the proposed alternatives. See *id.* at 1187.

265. *Id.* at 1227 (holding EA inadequate and substantial questions raised "as to whether the Final Action may have a significant impact on the environment"). Although on rehearing the court stepped back from requiring preparation of an EIS, the court appeared firmly convinced that NHTSA will eventually need to prepare an EIS. See *id.* at 1179 ("Petitioners' evidence demonstrates, overwhelmingly, the environmental significance of CO₂ emissions and the effect of those emissions on global warming. How NHTSA can, on remand, prepare an EA that takes proper account of this evidence and still conclude that the 2006 Final Rule has *no* significant environmental impact is questionable.").

and *no-project-left-behind* problems practically, but imperfectly. With any quantitative threshold, the action proponent must quantify anticipated GHG emissions for comparison.²⁶⁶ Once the agencies accomplish the rather formidable task of deciding how and where to set the quantitative thresholds²⁶⁷ and the proponent provides an estimate of anticipated emissions, the application to specific proposals becomes rather straightforward. Projects with anticipated GHG emissions above the threshold trigger EIS preparation and those with emissions below the threshold do not. Furthermore, the higher the threshold, the fewer number of actions that would cross the significance threshold. Conversely, the lower the threshold, the greater the number of actions that would be swept across the significance threshold.

Despite benefits of this approach, quantitative, above zero GHG thresholds arguably will exclude some projects with significant cumulative impacts on climate change (creating an under-inclusiveness defect). Conversely, quantitative GHG thresholds set close to zero arguably will increase the number of projects subject to full environmental review and potentially impose burdensome documentation requirements on small projects proponents (creating an over-inclusiveness defect).²⁶⁸

Who should have responsibility for threshold setting presents another knotty matter. If individual federal agencies or courts take on threshold setting responsibility, the specter of inconsistent climate significance thresholds seem likely (especially if quantitative thresholds are applied).²⁶⁹ If CEQ sets climate significance thresholds for all federal agencies, uniform thresholds result, but may fail to account for project specific considerations apparent to individual agencies with relevant project specific expertise. For these reasons, the best

266. Conceivably, every federal EA could include a rough calculation of GHG emissions based on an approved methodology. See e.g., New York DEPARTMENT OF ENVIRONMENTAL CONSERVATION, PRELIMINARY REVIEW DRAFT—FULL ENVIRONMENTAL ASSESSMENT FORM 10, 24-25 (Sept. 2008) (requesting applicant information regarding tons/year of carbon dioxide, nitrous oxide, methane and other GHGs and asking specifically whether the proposed project would generate more than specified tons/year of these GHGs for projects requiring air emission permits); see also KENDALL, *supra* note 220, at ii, 29 (recommending a requirement for conducting GHG calculations as part of the EA but only for certain projects (e.g., combustion sources generating 25 MW or above)). To the extent different federal agencies adopt different methodologies, however, their calculations seem likely to create inconsistency, coordination, actual gerrymandering, and appearance of fairness concerns. For these reasons, it makes sense for CEQ to provide guidance on approved methodologies.

267. Although subject to judicial deference, agencies will need to brace themselves for inevitable challenges that the adopted thresholds are too high, too low, or both.

268. New York State's advisory group identified this problematic aspect of their "incremental threshold approach," but ultimately relied on considerations of "fairness and practicality" to justify their recommendation. See KENDALL, *supra* note 220, at 14.

269. Similar concerns arise regarding responsibility for setting climate categorical exclusions; however, NEPA regulations currently require consultations on categorical exclusions that may dampen inconsistencies among agencies. See 40 C.F.R. § 1508.4 (2008).

initial strategy may be CEQ threshold guidelines with individual agency set limits.

b. Project specific triggers based on significance thresholds.—A second but similar approach establishes climate significance thresholds based on action type. Here regulators identify particular actions that automatically trigger a climate significance determination. By targeting specific projects for climate EIS review, regulators can focus attention on the most significant GHG emitters while limiting the regulatory burdens associated with review of the less significant emitters.

Massachusetts has adopted, and a New York advisory group has proposed, project-based significance threshold approaches for integrating climate concerns into their respective state environmental review processes. In 2007, the Massachusetts Executive Office of Energy and Environmental Affairs began requiring certain types of state agency proposals to quantify GHG emissions and identify measures to mitigate such emissions²⁷⁰ pursuant to the State's little-NEPA statute.²⁷¹ Specifically, the State's new climate assessment provisions apply only to projects requiring a state air quality or vehicular access permit that would otherwise trigger preparation of an EIR²⁷² under pre-existing threshold criteria.²⁷³ Thus, the Massachusetts project-based threshold addresses the *no-project-left-behind* problem by restricting climate analyses to a limited subset of projects (projects requiring state air quality permits or vehicular access permits). Similarly, a New York advisory group has tentatively recommended adoption of project-based GHG thresholds²⁷⁴ as part of its suggested approach for integrating climate considerations into environmental impact statements required by New York's State Environmental Quality Review Act (SEQRA).²⁷⁵ Under the recommended approach, actions otherwise requiring an EIS that exceed established "project type" and "project size" thresholds would be required to include a quantitative analysis of GHG emissions in the EIS.²⁷⁶ Actions otherwise requiring an impact statement, but below the project-based thresholds,

270. MEEA, MEPA POLICY, *supra* note 219, at 2-3.

271. Massachusetts Environmental Protection Act (MEPA), MASS. GEN. LAWS ANN. ch. 30, §§ 61-62 (2001 & Supp. 2008).

272. The Massachusetts EIR document resembles and serves a similar purpose to the NEPA EIS. Compare MAS. GEN. LAWS ANN. ch. 30, § 62B (2001), with 42 U.S.C. § 4332(2)(C) (2000).

273. MEEA, MEPA POLICY, *supra* note 219, at 2. Subject projects must additionally trigger environmental review (EIR preparation) based on non-climate considerations and exceed a de minimus level of GHG emissions for the climate analyses to come into play. See *id.* at 1-2. Thus, Massachusetts combines a project-based thresholds approach with "otherwise significant effects" and "categorical exclusion" approaches discussed below. For discussion of these complementary regulatory strategies, see *infra* Part III.B.2-3.

274. See KENDALL, *supra* note 220, at 13 ("Therefore, we call upon DEC to promulgate thresholds for the types of projects that will likely be sizable enough to require a quantitative analysis of GHG emissions and mitigation measures.").

275. N.Y. ENVTL. CONSERV. LAW §§ 8-0101 to -0177 (McKinney 2005 & Supp. 2009).

276. See KENDALL, *supra* note 220, at 13, 29.

would need only include a qualitative analysis of the action's climate change impacts in the EIS.²⁷⁷ And, for actions requiring an EIS, but *demonstrably* unlikely to result in any GHG emissions (e.g., certain rule-making actions), no climate analyses would be required at all.²⁷⁸

If CEQ opted for a project-type threshold approach, it could call on each federal agency to identify projects and programs posing the greatest risk to climate disruption (e.g., permitting of coal-fired energy facilities or transportation sector regulations).²⁷⁹ Only the identified project types would trigger NEPA EIS climate review. Advantageously, project-based thresholds prioritize public and regulator attention on the climate effects of the most climate impacting proposals (ideally those offering the greatest bang for the buck). This upside is also a downside: project-based triggers are by design under-inclusive and exclude from review actions likely to have smaller but still arguably cumulatively significant impacts on climate change. The consequence of this under-inclusiveness not only creates an informational gap, but also the potential for challenges against federal agencies based on statutory violations of NEPA. In short, the NEPA climate significance paradox remains only partially resolved.

2. *The Otherwise Significant Effects Limitation.*—Another option for avoiding the problem of *no-project-left-behind* (too many EISs) simply restricts NEPA climate review to those actions that would otherwise require EIS preparation (irrespective of GHG contributions). Both Massachusetts regulators and New York's Advisory Group have adopted an "otherwise significant effects" approach to climate integration. Under the Massachusetts protocol, climate analyses come into play only if the proponent must prepare an EIR based on other environmental considerations (and the action exceeds the project-based thresholds).²⁸⁰ Similarly, the New York Advisory Group recommends GHG analyses only for projects otherwise subject to a state EIS (that also meet project type and size thresholds), with a limited exception for certain generators and sewage treatment facilities.²⁸¹

The "otherwise significant effects" approach offers a comforting bright-line test for climate integration and eliminates concern over too many additional EISs. However, if federal agencies limit climate analyses only to actions already requiring EIS preparation, actions with substantial direct or indirect GHG emissions—but no other significant environmental effects—would evade close scrutiny under NEPA. This option creates a potentially greater under-inclusiveness defect than posed by qualitative and project type thresholds (which

277. *Id.* at 29.

278. *Id.*

279. See 40 C.F.R. § 1507.3(b)(2)(i) (2008) (providing required agency procedures). Many federal agency regulations identify projects and program classes that normally trigger EIS review. See, e.g., 23 C.F.R. § 771.115(a) (2008) (listing three examples of transportation projects triggering EIS review).

280. See MEEA, MEPA POLICY, *supra* note 219, at 2. Massachusetts' approach combines a "project-type" threshold with an "otherwise significant trigger."

281. See KENDALL, *supra* note 220, at 29.

might trigger an EIS for projects not otherwise subject to the EIS requirement).²⁸² Moreover, just as with the threshold approaches, this strategy for integrating climate impact consideration may create informational gaps and encourage legal challenges based on statutory violations of NEPA. In short, on its own the approach offers only a partial solution to the NEPA climate significance paradox.

3. *Categorical Exclusions*.—Another regulatory solution relies on NEPA climate categorical exclusions. CEQ defines a “categorical exclusion” as “a category of actions which do not individually or cumulatively have a significant effect on the human environment.”²⁸³ With respect to climate impacts, federal agencies may consider adopting GHG categorical exclusions to address the *no-project-left-behind* dilemma. Massachusetts has taken an analogous route by establishing a GHG de minimus exception, exempting target projects with trivial GHG emissions from otherwise required climate analyses.²⁸⁴ Similarly, federal agencies could adopt categorical exclusions for agency actions by identifying GHG emission levels or project categories with GHG emissions too negligible, trivial, or minuscule to individually or cumulatively have a significant impact on global climate and the environment. Although, as a theoretical matter, this option can eliminate *no-project-left-behind* concerns, legal challenges to climate categorical exclusions seem inevitable, particularly regarding the absence of cumulative significance.

In sum, regulatory authorities present options for solving the NEPA climate significance threshold paradox, but raise many complicating and complex policy questions for administrative agencies.

C. NEPA Statutory Fixes—Brave New World

Statutory fixes can fill the gap where NEPA’s existing authorities and permissible regulatory approaches cannot adequately resolve the NEPA climate significance paradox. First, NEPA amendments explicitly mandating climate analyses or requiring Climate EISs would shut down any lingering debate about the need for NEPA review as a general matter. Also, congressionally set NEPA climate significance thresholds and climate categorical exclusions can directly address the *no-project-left-behind* dilemma without subjecting federal agencies to the flood of litigation challenges opened by interpretive and regulatory fixes. Moreover, congressional NEPA reforms offer the possibility of uniform, national

282. New York State’s advisory group identified this problematic aspect of their recommended approach and included a partial solution. First, the group acknowledged that by limiting climate analyses to actions already requiring an EIS, certain actions with cumulative adverse impacts on climate change might avoid any appropriate review. *See id.* at 13. To address this potential under-inclusiveness problem, the group recommended that certain combustion and sewage treatment facilities not otherwise requiring an EIS be required to supplement their EAs with climate impact analyses. *Id.* at 29. This approach resembles the “no solution, solution” discussed previously. *See supra* Part III.A.2.C.

283. *See* 40 C.F.R. § 1508.4 (2008).

284. MEEA, MEPA POLICY, *supra* note 219, at 2.

NEPA climate provisions without the potential for the inconsistencies of agency-by-agency climate environmental review procedures.

Second, national climate protection legislation could help resolve the NEPA threshold paradox. A national climate protection act with GHG caps, GHG reporting requirements, industry or development GHG emission limits, or even GHG taxing thresholds could provide relevant legal standards for application to NEPA climate significance determinations without the need to amend NEPA itself. And yet, to the extent future climate legislation targets only certain sectors (e.g., agriculture or transportation but not industry), certain industries (e.g., energy but not timber), or certain GHGs (e.g., carbon dioxide and methane but not nitrous oxide), there may be gaps in the amount of relevant legislative guidance. Alternatively, national climate legislation could resolve the NEPA climate threshold paradox simply by exempting federal actions subject to new climate legislation from any compliance with NEPA. Such statutory exemptions already exist for certain federal actions subject to the Clean Air and Clean Water Acts.²⁸⁵ Although expedient, this last option eliminates all informational and educational benefits of having NEPA.

With the end of the Bush Administration's control of the executive branch, the past reluctance of the federal government to legislatively address climate change seems unlikely to continue. Both the Democrat and the Republican 2008 presidential candidates indicated support for national climate legislation²⁸⁶ and both seem in favor of some form of a cap and trade program for achieving GHG reductions.²⁸⁷ Moreover, even prior to officially taking office, President-Elect Obama signaled his commitment to act on global warming nationally and internationally.²⁸⁸ If enacted, such a federal statutory cap on GHG emissions would aid agency significance determinations under NEPA by establishing a national target by which to compare federal agency GHG emissions.

285. Clean Air Act NEPA Exemption, 15 U.S.C. § 793(c)(1) (2006); Clean Water Act NEPA Exemption, 33 U.S.C. § 1371(c) (2000).

286. Although McCain opposed U.S. participation in the Kyoto Protocol in 1997, he co-sponsored the Lieberman-McCain Climate Stewardship Act in 2003, one of the earliest attempts at national climate legislation. See Michael B. Gerrard, *McCain vs. Obama on Environment, Energy, and Resources*, 23 NAT. RESOURCES & ENV'T 3, 3 (Fall 2008). Obama also opposed the Kyoto Protocol in the late 1990s, but has supported climate protection efforts since becoming a U.S. Senator. *Id.* at 3-4.

287. *Id.* at 4.

288. Reiterating his commitment to address climate change, then President-Elect Obama told attendees at the 2009 Global Climate Summit:

I promise you this: When I am president, any governor who's willing to promote clean energy will have a partner in the White House. Any company that's willing to invest in clean energy will have an ally in Washington. And any nation that's willing to join the cause of combating climate change will have an ally in the United States of America.

President Elect Obama's Remarks to Governor's Global Climate Summit, <http://climaticidechronicles.org/2008/11/18/obama-makes-powerful-statement-on-climate-change-promises-action/> (last visited Feb. 19, 2009).

By way of analogy, California agency officials identified an option for integrating consideration of climate impacts, CEQA (California's little-NEPA Act),²⁸⁹ and the California Global Warming Solutions Act of 2006²⁹⁰ (the State's climate protection legislation). Specifically, CAPCOA considered the implications of applying a "no significance threshold for GHG emissions."²⁹¹ Under the "no significance threshold" option, category-specific reduction targets established pursuant to California's Global Warming Solutions Act help determine whether a stationary source project's GHG emissions trigger CEQA's environmental report requirement.²⁹²

Even with a new administration less dismissive of climate concerns and national climate legislation visible on the horizon, a regulatory void will remain until Congress drafts²⁹³ (or recrafts from earlier efforts²⁹⁴), enacts, and implements NEPA amendments or national climate legislation. With the extended attention on the nation's economic crisis, the multi-billion dollar government bailout, and efforts to re-regulate financial institutions, rightly or wrongly, climate change legislation may take a back seat to other legislative efforts. In the interim years,²⁹⁵ federal agencies and the courts will continue to grapple with the NEPA climate threshold paradox on their own.

CONCLUSION

Little doubt exists that NEPA climate integration is "in the air" so to speak. How to do it well—meaning in a way that informs decisionmakers of significant climate consequences of their actions, averts paper work hell, and is not stymied by litigation challenges—remains an open, perplexing, but not insurmountable challenge. Interpretive, regulatory, and statutory opportunities exist to meet the challenge and the little-NEPA climate integration projects—pioneering and forward looking—offer worthy models for imitation at the federal level.

289. California Environmental Quality Act (CEQA), CAL. PUB. RES. CODE §§ 21000-21177 (West 2007 & Supp. 2008).

290. CAL. HEALTH & SAFETY CODE §§ 38500-38599 (West 2006 & Supp. 2009).

291. THOLEN ET AL., *supra* note 97, at 2.

292. *Id.* at 16.

293. The 2008 Dingell-Boucher Climate proposal represents one such option for moving forward. See House Committee on Energy and Commerce, 110th Cong., Climate Change Legislation Discussion Draft (Oct. 7, 2008), http://energycommerce.house.gov/images/stories/Documents/PDF/selected_legislation/clim08_001_xml.pdf.

294. The 2007 climate bills might also offer a jumping off point for future efforts. See, e.g., Lieberman-Warner Climate Security Act of 2007, S. 2191, 110th Cong. (as reported in Senate, May 20, 2008).

295. This view accords with business leader predictions of at least a five year delay until national climate legislation takes effect. See Nathaniel Gronewold, *Wall Street Sees National Carbon Market at Least Five Years Away*, CLIMATEWIRE (Sept. 11, 2008).

REBUILDING THE PUBLIC-PRIVATE CITY: REGULATORY TAKING'S ANTI-SUBORDINATION INSIGHTS FOR EMINENT DOMAIN AND REDEVELOPMENT

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ABSTRACT

The eminent domain debate, steeped in the language of property rights, currently lacks language and conceptual space to address what is really at issue in today's cities: complex, fundamental disagreements between market and community about development. The core doctrinal issue presented by development is how can we acknowledge the subordination of citizens who happen to live in areas that are attractive to wealthier citizens. In particular, how should we address the political process failure reflected in the privatized methods of decisionmaking that typify redevelopment? The conceptual language and analytical construct for appropriately addressing these issues come from critical race theory and its project of anti-subordination. The doctrinal model for resolving urban development disagreement comes from the anti-subordination principles reflected in regulatory takings doctrine. This Article argues that regulatory takings doctrine reflects one of the most developed, yet underappreciated, anti-subordination doctrines in the law. Both takings and critical race theory provide a template for properly focusing on ways to improve the lack of public accountability in development and the unresponsiveness of eminent domain doctrine to commonly accepted notions of fairness as a component of the public good.

*"They don't know I got a[n] [eminent domain] clause of my own They can carry me out feet first . . . but my clause say . . . they got to meet my price!"*¹

—*Memphis Lee, Two Trains Running*

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1. AUGUST WILSON, *TWO TRAINS RUNNING* act 1, sc. 3 (1992) (statement of "greasy spoon" proprietor Memphis Lee). See Frank Rich, *Two Trains Running; August Wilson Reaches the 60's With Witnesses From a Distance*, N.Y. TIMES, Apr. 14, 1992, at C13 (Lee who "is negotiating a price for the city's demolition of his restaurant, is confident he can beat the white man at his own game as long as he knows the rules").

INTRODUCTION

With the failed challenge to the exercise of eminent domain in *Kelo v. City of New London*,² the state of eminent domain constitutional doctrine continues to be highly deferential to states and local government. For some reason, the popular objection to the sanction of economic development as an acceptable constitutional justification did not translate within the confines of eminent domain jurisprudence. The unresponsiveness of federal constitutional doctrine might be due to the ways that the challenge is typically framed. Objections are framed in highly individualized terms as issues of private property rights, discussed entirely along the axis of the public/private distinction.³ These public/private arguments demanded that the Court attempt to draw what would likely be unadministrable hard lines between valid and invalid purposes.

The overall eminent domain debate pits two types of concerns against each other in a dialogue that speaks past the other in different languages. At the core of the opposition are earnest and deeply held beliefs about individual property rights: claims to reliance and expectation interests that must be protected against governmental decisions. These emotionally charged arguments typically reflect outrage over the perceived violation of fundamental guarantees of free choice, control over unwanted change, and against uncertainty.⁴ Powerlessness in the face of change is part of the human condition, but legal doctrinal powerlessness in the face of human-initiated change is profoundly different; it suggests a frustrating lack of agency in the face of unfair governmental decisionmaking, which has the legitimizing imprimatur of democracy.

2. 545 U.S. 469 (2005).

3. See, e.g., Larry Alexander, *The Public/Private Distinction and Constitutional Limits on Private Power*, 10 CONST. COMMENT. 361, 363-64 (1993) (evaluating the criticism of the public-private distinction that "state action . . . [is] ubiquitous" in a system of laws); Gerald Turkel, *The Public/Private Distinction: Approaches to the Critique of Legal Ideology*, 22 LAW & SOC'Y REV. 801, 812-13 (1988) (arguing that treating the public-private distinction as a relative concept saves it from incoherency by a continuum of images "ultimately, rooted in imagery from the past: 'The distinction is dead, but it rules us from the grave.'"); Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 TEX. L. REV. 225, 226 (1985) (book review) ("Doctrines that incorporate the public/private distinction include the principles that localities may issue bonds only for 'public purposes' and may be sued for torts committed in their private (proprietary) but not their public (governmental) capacity; that the government may take land in eminent domain only for 'public uses.'") (citations omitted).

4. See Kristi M. Burkard, *No More Government Theft of Property! A Call to Return to a Heightened Standard of Review After the United States Supreme Court Decision in Kelo v. City of New London*, 27 HAMLINE J. PUB. L. & POL'Y 115 (2005); Gideon Kanner, *The Public Use Clause: Constitutional Mandate or "Hortatory Fluff"?*, 33 PEPP. L. REV. 335 (2006); Brent Nicholson & Sue Ann Mota, *From Public Use to Public Purpose: The Supreme Court Stretches the Takings Clause in Kelo v. City of New London*, 41 GONZ. L. REV. 81 (2005); Sonya D. Jones, Note, *That Land Is Your Land, This Land Is My Land . . . Until the Local Government Can Turn It for a Profit: A Critical Analysis of Kelo v. City of New London*, 20 BYU J. PUB. L. 139 (2005).

Arguments by urban development proponents of eminent domain are rational in defense of the need for both growth and change to reverse or avert urban decline.⁵ At the core of these arguments is a communitarian-like defense of the need for eminent domain: use “change” as a route to progress and urban economic health.⁶ That such change and growth may come at the expense of a few is a price worth paying in order to protect and promote the interests of the general good of the local polity.

Currently, there is no conceptual space or language in this property versus community debate to meaningfully acknowledge and address what is really at issue in today’s cities: complex, fundamental disagreements between market and community about development, economic growth, prosperity, and communal needs. The overarching question fueling the eminent domain issue is, can, and should, legal doctrine address the structural shift and current biases of the global economy? Market demand, fueled by globalization, weighs the interests of wealth more than the disaggregated claims of property rights presented by residents (either tenants or owners). This results in types, locations, and methods of development that are subordinating. An unanswered economic question about eminent domain is how the globalized economy affects or controls local government’s need to work to further local economic development. Are there so few choices left after globalization that the current approaches to economic development are inevitable?⁷

Doctrinally, the specific issue is how to address the subordination of citizens who happen to live in areas that are now attractive to wealthier citizens. We have not grappled with subordination resulting from the state and local political process. This subordination is reflected in the privatized method of decisionmaking that typifies redevelopment. Redevelopment’s improvements most often come at the expense of a consistent few types of persons: poor, working class people; however, there is an increasing effect on middle-class residents.

The conceptual language and analytical construct for addressing these issues come from critical race theory. Race, class, and wealth have long been at the

5. See, e.g., Brief for the American Planning Association et al. as Amici Curiae Supporting Respondents, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 166929; Daniel H. Cole, *Why Kelo Is Not Good News for Local Planners and Developers*, 22 GA. ST. U. L. REV. 803 (2006); Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of a Very Public Power to Private, Non-Profit and Charitable Corporations*, 56 AM. U. L. REV. 455 (2007); Marc B. Mihaly, *Living in the Past: The Kelo Court and Public-Private Economic Redevelopment*, 34 ECOLOGY L.Q. 1 (2007).

6. See Cole, *supra* note 5, at 824 (noting that main supporters of the eminent domain power are “local government groups, such as the National League of Cities, city planners, and developers”).

7. A growing body of literature suggests that globalization need not have taken either the shape or the pace that it has in the United States. See, e.g., William Sites, *Primitive Globalization? State and Locale in Neoliberal Global Engagement*, 18 SOC. THEORY 121, 125 (2000) (arguing that different nations understand and have responded to globalization differently).

heart of the claim against eminent domain. The debate over eminent domain is inadequately acknowledged as a geographically and racially identified debate over development now being fueled by globalization. Prior to *Kelo v. City of New London*,⁸ eminent domain and redevelopment was largely a Black and urban phenomenon. The introductory epigraph quotes Memphis Lee, a character in an August Wilson play, and illustrates that eminent domain and redevelopment have been such a part of the Black American experience that it makes an appropriate plot. The perceived need to improve dilapidated, underserved, economically disconnected communities has been primarily located in poor or working-class, Black neighborhoods in the inner city. As demonstrated by the massive disruptions of community resulting from poorly conceived and poorly executed redevelopment schemes during the urban renewal era, the oppression of the “blight” designation predates *Kelo*, yet has long been accepted as part of the normal terrain of the urban landscape. *Kelo*, however, geographically decoupled eminent domain from the inner city and made clear that the power could potentially be exercised anywhere, even outside of the Black inner cities.⁹ By clarifying that “economic development” now permits property and communities to theoretically be taken and remade anywhere, the oppressive aspects of the broad term “development” is now receiving long overdue attention.¹⁰

The purpose of this Article is to bridge the language gap in the eminent domain discourse by translating the property rights language into the anti-subordination language of critical race theory. The best legal doctrinal model for resolving these urban development disagreements comes from the suburbs,¹¹ from the anti-subordination principles reflected in regulatory takings doctrine.¹²

8. 545 U.S. 469 (2005).

9. This point was presaged by *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984), where the eminent domain context was outside the inner city and focused on remedying a problem of oligopoly and concentration of land ownership.

10. The perception that the doctrine has shifted geographically has led to an alliance between otherwise strange bedfellows. Conservative property rights groups, small business owners, communitarians, and the NAACP have all united to oppose eminent domain. See Abraham Bell & Gideon Parchomovsky, *The Uselessness of Public Use*, 106 COLUM. L. REV. 1412, 1418 (2006) (“The case united, if only for a short while, such unlikely allies as the Institute for Justice, the NAACP, Richard Epstein, and Amitai Etzioni, all of whom opposed the planned taking.”) (footnotes omitted).

11. Regulatory takings doctrine arises mainly from development controversies in suburban and rural settings. Though exercises of eminent domain have largely been confined to urban settings, they are increasingly occurring in inner-ring suburbs. See Wendell E. Prichett, *Beyond Kelo: Thinking About Urban Development in the 21st Century*, 22 GA. ST. U. L. REV. 895, 914 (2006) (arguing that the *Kelo* controversy reflects the move of the use of eminent domain to suburban locations).

12. See, e.g., *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). Although *Tahoe-Sierra* ostensibly stands for a very deferential standard for local government, which most experts agree means that the vast majority of takings challenges will fail under federal constitutional grounds, takings doctrine, nevertheless, illustrates what courts have

Because regulatory takings doctrine reflects one of the most developed, yet underappreciated, anti-subordination doctrines in the law, it provides a template for properly focusing on ways to improve the lack of public accountability and increase development's responsiveness to commonly accepted notions of public good. Financially compensated urban eminent domain condemnations and financially uncompensated exercises of suburban regulatory power (through moratoria on development or development exactions) involve analogous discretionary decisionmaking. In regulatory takings doctrine, the Supreme Court is interested both in individual property rights and in protecting property owners as a group from the public enterprise of government and the public needs of the general welfare.¹³

The evolution of the ad hoc doctrine of regulatory takings reflects an imperfect, yet effective, attempt to insulate private property owners from the structural inequities of the political process. In such cases, the harms to a few, or to consistently disadvantaged groups that are unable to affect governmental decisionmaking, suggests a structural compromise of property rights. The doctrine's evolution includes attempts to harden property rights protections by intervening to protect property owners on principle.¹⁴ This evolution suggests that regulatory takings is an anti-subordination doctrine. Thus, regulatory takings' anti-subordination logic allows us to account for the impact of eminent domain on property owners as well as on community. It allows us to move past focusing solely on the problems of the property owners to define the problem. We shift instead to a definition that encompasses the resident (whether owner or renter) and the small business person (a commercial resident), as well as the problems of low-wage workers who want to join in a community either as resident or laborer.

Part I of this Article discusses the nature of development disagreements in cities and the problems in both the *Kelo* majority and dissenting opinions. I argue that deference to local government in determining public purpose makes sense, but fails to account for the subordination inherent in much redevelopment. I also argue that the test advanced by the *Kelo* dissent, which reflects the prevailing view in the United States as indicated by the flurry of state eminent domain legislation and some subsequent state court decisions,¹⁵ is unduly narrow and unadministrable. The dissent's concern for the impact of eminent domain

found most compelling to protect for property owners. See *infra* Part II.E.

13. See, e.g., *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123-26 (1978) (discussing the important factors in regulatory takings jurisprudence).

14. See, e.g., *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) (adopting a categorical rule that a public easement was the equivalent of a permanent physical occupation and an invalid taking regardless of the impact on the market value of the land); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (requiring tenants to receive cable was a taking because the presence of the cable wire on the property owner's building destroyed the right to exclude).

15. See David A. Dana, *The Law and Expressive Meaning of Condemning the Poor After Kelo*, 101 Nw. U. L. REV. 365, 372-73 (2006).

approaches, but fails to fully adopt, an anti-subordination logic. I seek to expand upon these concerns by fully explicating the hidden and not-so-hidden subordination in redevelopment.

Part II explores Fifth Amendment Takings rationale and its implicit Equal Protection concerns as ways to doctrinally frame the obligations of government to refrain from using its powers to subordinate certain citizens. Part II also discusses the relevance of development disagreements in the suburbs and the effort to define property rights to protect one's property in the face of great public desire to preserve nature. I trace the evolution of the reasoning of regulatory takings doctrine in particular and examine the Court's attentiveness in scrutinizing the nature of the harm suffered. The imperfect evolution of the doctrine's attempt to create hard and fast property-based protections against government decisionmaking has, at the very least, signaled to local governments that they should tread carefully when imposing anti-development regulation and individual interests are in conflict with great public need.¹⁶ The principles derived from regulatory takings suggest a "gut" fairness standard that must be applicable to disagreements over redevelopment. These disagreements manifest most often in disputes over the exercise of eminent domain.

Part III concludes by suggesting how critical race theory's anti-subordination principles might be applied in the context of a "'carefully considered' development plan."¹⁷ If the plan is to be a validating device for redevelopment, it must be formulated to ensure some likelihood that it reflects representative interests within the polity.

I. DEVELOPMENT DISAGREEMENTS IN THE CITY

A. *The Supreme Court Majority's Embrace of Rational Deference*

1. *In the Beginning: Berman v. Parker and Urban Renewal.*—The Supreme Court's eminent domain jurisprudence illustrates the consistent, yet evolving, nature of disagreements over development in the cities. When the first redevelopment case of the modern era, *Berman v. Parker*,¹⁸ was decided, the motive for redevelopment was to offset the beginnings of urban decline by eliminating slums and redesigning the community according to the modern planning principles of the time.¹⁹ The petitioners' arguments focused on the

16. See Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 116 (2001) (indicating that "California planners have a high awareness of the [U.S. Supreme Court Takings] cases").

17. See *Kelo v. City of New London*, 545 U.S. 469, 478 (2005) (quoting *Kelo v. City of New London*, 843 A.2d 500, 536 (Conn. 2004)).

18. 348 U.S. 26 (1954).

19. For an extensive discussion of the modernist planning principles and their impact on the urban renewal era, see Keith Aoki, *Race, Space, and Place: The Relation Between Architectural Modernism, Post-Modernism, Urban Planning, and Gentrification*, 20 FORDHAM URB. L. J. 699,

expansion of the redevelopment area beyond acknowledged slum areas and the insufficiency of the Redevelopment Authority's justifications for the plan. Petitioners argued their store was not properly characterized as blighted slum housing because general aesthetics was not a proper public purpose, and the transfer of the property from the Redevelopment Authority to private real estate developers was not a public use.²⁰ These arguments continue to this day to encompass the core of the arguments against exercises of eminent domain for economic development.²¹ As illustrated by Keith Aoki's work, the development disagreement of the urban renewal era was the conflict between what was perceived to be modern and undesirably pre-modern.²² There was the sense of an inexorable need to progress and abandon the past in order to properly meet the future. More concretely, the city foresaw a need to modernize in order to survive, but residents felt the changes came at their expense. Even though redevelopment plans were allowed to encompass viable working neighborhoods, the *Berman* Court affirmed the propriety of eminent domain used for these purposes.²³ The thought was that scientific excising of diseased or harmful areas needed to include adjacent unblighted land for a thorough, comprehensive redesign to prevent worsening conditions.²⁴ The Court found that this strategy was necessary and appropriate so long as the government said it was.²⁵

2. *The Difference Between Now and Then: Urban Renewal Versus Economic Development.*—The objections raised in *Berman* are not dissimilar from today's eminent domain objections. The redevelopment scenarios in each case, although separated by fifty-plus years and labeled differently, are quite similar. The concern in both New London and Southwest D.C. was, and is, to reverse decline and keep the cities viable.²⁶ What has changed about today's

767 (1993).

20. *Berman*, 348 U.S. at 31. Of course, what took place after the decision was drastic, poorly planned clearance and demolition, not just of slums and dilapidated housing, but of thriving neighborhood commercial districts and residential areas. Entire communities were displaced throughout the United States, usually working-class, and Black. This gave urban renewal the bad name it still carries today. See MARTIN ANDERSON, *THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL 1949-1962*, at 8-9 (1964); JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 5 (1961); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 47 (2003).

21. See, e.g., *Kelo*, 843 A.2d 500 (plaintiffs challenge whether economic development is a valid public use and whether the taking of plaintiffs' land was reasonably necessary to the development plan).

22. See Aoki, *supra* note 19, at 765-73.

23. *Berman*, 348 U.S. at 34-35.

24. *Id.*

25. *Id.* at 36.

26. See Mihaly, *supra* note 5, at 4 (arguing that "[s]imple ignorance of the transformed and transforming nature of city-center land use development lies at the heart of the pervasive popular reaction to the *Kelo* decision. Americans enjoy the fruits of economic redevelopment . . . They do not, however, understand how the transformation occurred"). Mihaly also argues that the *Kelo*

development disagreements, however, is the prevailing view of what needs to be done to keep cities viable in the twenty-first century. Dramatic changes have taken place in available types of employment; the opportunity for stable, well-paid, self-directed work continues to decline.²⁷ The gap continues to widen between the highly compensated and everyone else.²⁸ Technology allows for sudden inflation and deflation of markets, economies, and currency through rapid global investment and disinvestment.²⁹ These changes have been heightened by the United States' relatively rapid entry into liberalized markets and globalization.³⁰ Thus, the problem is the same yet different. Adding the global dimensions of our collective exposure, and the city's exposure, to homogenizing market forces makes the already high stakes even higher. What is also different is that the underlying plan supporting the exercise of eminent domain in *Kelo* was openly conceived in tandem with, and designed to meet the specific needs of, a private corporation, Pfizer Pharmaceutical.³¹ The *Berman* question remains but is perhaps attenuated: what should a city like New London do to address dire economic conditions? In older, inner-ring suburbs that have lost their economic and social purpose, what can be done to address the reality of their decline?³²

In holding that economic development met the Fifth Amendment standard for public use by serving a valid public purpose,³³ the *Kelo* majority opinion carefully navigated a minefield of problems and contradictions. The problems all concern identifying a principled line that distinguishes proper from improper takings. In particular, the overt privatization of the development process produces a great challenge to the underlying public rationale of eminent domain. In order to provide continued justification for a city's exercise of eminent domain, the *Kelo* opinion had to decide between the private impact on resistant property owners and the public welfare. Although the Court noted the deeply

majority opinion follows *Berman*, but does not follow its pro-development stance. *See id.* at 59.

27. *See* DAVID DOOLEY & JOANN PRAUSE, THE SOCIAL COSTS OF UNDEREMPLOYMENT: INADEQUATE EMPLOYMENT AS DISGUISED UNEMPLOYMENT 11-14 (2004) (discussing differing patterns of under-employment for men, women, and minorities).

28. *See* Saskia Sassen, New Employment Regimes in Cities, *in* CITIES, ENTERPRISES AND SOCIETY ON THE EVE OF THE 21ST CENTURY 129, 136 (Frank Moulaert & Allen John Scott eds., 1997) (noting a dualization in wages in information and knowledge-intensive service industry wages).

29. *See* LARRY J. RAY, GLOBALIZATION AND EVERYDAY LIFE 66-67 (2007) (discussing the networks of trust and cultural practices that support rapid global capital flows).

30. *See* Sites *supra* note 7, at 127.

31. *Kelo v. City of New London*, 545 U.S. 469, 477-78 (2005).

32. *See generally* Mole Davis, *Ozzie and Harriet in Hell: On the Decline of Inner Suburbs*, *in* SPRAWL AND SUBURBIA 27 (William S. Sanders ed., 2005); WILLIAM H. LUCY & DAVID L. PHILLIPS, CONFRONTING SUBURBAN DECLINE: STRATEGIC PLANNING FOR METROPOLITAN RENEWAL 18-19 (2000).

33. *Kelo*, 545 U.S. at 484 ("Because that plan unquestionably serves a public purpose, the takings challenged here satisfy the public use requirement of the Fifth Amendment.").

held personal value placed on the property,³⁴ the dashed feelings of the few were outweighed by the potential benefits to the many.³⁵ By emphasizing the city's perspective, the majority opinion was able to consider the dire economic conditions in New London separate from the specific interests that different groups of citizens, particularly residents of the redevelopment area, might have had.³⁶

3. *The Kelo Majority and Legitimizing the Privatized City as Public.*—Possibly the most difficult problem in crafting eminent domain doctrine is how to address the intertwined private-public nature of the redevelopment.³⁷ If a city believes that it absolutely must facilitate private business, what happens to assumptions that cities are public and acting on behalf of the general welfare? Does the city, by working so closely with, and acting in the interests of, a private corporation, lose its public character? Who gets to formulate the answer? According to *Kelo*, the city and the state give the answer.³⁸ According to both dissenting opinions, it is the courts who give the answer on behalf of property owners.³⁹ Recall that the arguments presented centered on the transfer of the property to a private company to redevelop the property for its own private benefit.⁴⁰ Because the Court has long-used a functional distinction to treat cities as having a public or private character,⁴¹ it is no longer sufficient for the City to formally, as a matter of its legally designated identity, be the City in order to be public and entitled to exercise eminent domain. The “public-ness” of the City is, in effect, a rebuttable presumption.⁴² Thus, the overall task for the *Kelo* majority opinion was to restore the City's eroding public legitimacy. It attempted to do so first by resorting to legal formalism and finding that the first source of City power and legitimacy came from the State.⁴³ This, of course, could not be the

34. See *id.* at 475 (noting that Kelo had made extensive improvements to her house and valued it for its view).

35. See Alberto B. Lopez, *Weighing and Reweighing Eminent Domain's Political Philosophies Post-Kelo*, 41 WAKE FOREST L. REV. 237, 243-45 (2006) (discussing the competing influences of republicanism and liberalism in the logic and philosophy of eminent domain).

36. See *Kelo*, 545 U.S. at 483-84.

37. See CHRISTOPHER B. LEINBERGER, *TURNING AROUND DOWNTOWN: TWELVE STEPS TO REVITALIZATION* 5 (Brookings Institution 2005) (describing today's approach to development as a “private/public partnership”).

38. See *Kelo*, 545 U.S. at 478.

39. *Id.* at 494 (O'Connor, J., dissenting), 506 (Thomas, J., dissenting).

40. *Id.* at 485 (“Petitioners contend that using eminent domain for economic development impermissibly blurs the boundary between public and private takings. Again, our cases foreclose this objection. Quite simply, the government's pursuit of a public purpose will often benefit individual private parties.”).

41. See, e.g., *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

42. See *id.*

43. *Kelo*, 545 U.S. at 483-84 (noting that the City invoked a state statute specifically allowing eminent domain for economic development to effectuate its redevelopment plan).

sole determinant of the sufficiency of the City's "publicness" because the authority derived from the State does not speak directly to the eminent domain objections. The main challenge to the City's public legitimacy stemmed from doubt about the City's public motivations and the certainty that they were pretextual because private interests were at the heart of the City's decisions.⁴⁴ The Court used the phrase purely *private purpose* as an example of potentially pretextual public purpose.⁴⁵ A city having an actual purpose of bestowing a private benefit would supposedly be engaging in an arbitrary and capricious due process violation.⁴⁶

The other aspect of the city's eroding public legitimacy is the breadth of "economic development" as a justification. Many find economic development an unconvincing justification because anything can be justified as done in furtherance of economic development. Too often, the incremental, tertiary benefits of economic development are over-touted as real.⁴⁷ The results of public subsidy, either through direct financial support or assistance of eminent domain for site assembly, are rarely scrutinized and promises for jobs are rarely enforced.⁴⁸

The next significant source for strengthening the City's public legitimacy in the majority opinion comes from the City's planning function: New London had exercised eminent domain in connection with a "carefully considered" development plan."⁴⁹ The plan itself was regarded as legitimate because the reality of dire conditions in the city demonstrated a need to improve economic conditions. New London had long slipped off the national economic radar and recently lost its naval installation.⁵⁰ The city was also designated by the State as a "distressed municipality" eligible for state financial assistance.⁵¹ From the

44. *Id.* at 485.

45. *Id.* at 477 (citing *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984)).

46. *See id.* at 478 n.5.

47. *See, e.g.,* Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 390-91 (1996).

48. *See* Mark Richard Lindblad, *Performance Measurement in Local Economic Development*, 41 URB. AFF. REV. 646, 646 (2006) ("Despite the trend toward accountability in the public sector, little inferential research exists on the use of accountability tools . . . in local economic development [I]n municipal policy making, both structural constraints and local choices matter, but local choices matter more."); *see also* JULIAN GOSS ET AL., COMMUNITY BENEFITS AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 21-22 (2005) (recommending ways to enforce local economic development agreements).

49. *See Kelo*, 545 U.S. at 478 (quoting *Kelo v. City of New London*, 843 A.2d 500, 536 (Conn. 2004)).

50. *Id.* at 473 ("In 1996, the Federal Government closed the Naval Undersea Warfare Center, which had been located in the Fort Trumbull area of the City and had employed over 1,500 people.").

51. *Id.*; *see* CONN. GEN. STAT. ANN. § 32-9(p) (West 2003) (defining distressed municipality, a term which arose from the federal Urban Development Action Grant (UDAG) program. Following termination of the UDAG program, the designation made the city eligible for state

majority's perspective, the validity of the City's purpose was ratified because it was part of a carefully considered plan of development, as well as by the traditional local and state activity of promoting economic development.⁵² Thus, the problem addressed sufficiently matched the stated purposes of the development plan.

Curiously, the comprehensiveness of the development plan is also a legitimizing basis for the exercise of eminent domain. This is ironic because the underlying objection to the exercise of eminent domain often is to the comprehensiveness of the plan. While the Court acknowledged that the Pfizer and New London Development Corporation (NLDC) plans were connected, "local planners [by inference the NLDC] hoped that Pfizer would draw new business to the area, thereby serving as a catalyst to the area's rejuvenation,"⁵³ the Court found that the transfer was a method of development that was sufficiently public to meet the public use test.⁵⁴ While seeking to convey a purely private benefit is never a valid goal,⁵⁵ the existence of a plan that passed a rational relationship test ensures that the city never seriously encountered the problem of seeking to confer a private benefit.⁵⁶

The final source of City legitimacy was that economic development is a valid and traditional goal of state and local government.⁵⁷ That is, seeking to attract or retain private companies is a legitimate government function.⁵⁸ All that New London had chosen to do, with the hope of ensuring its financial survival and continued provision of services to its residents, was to capitalize on possibly one of its few assets—its waterfront.

The City has carefully formulated an economic development plan that it believes will provide appreciable benefits to the community, including—but by no means limited to—new jobs and increased tax revenue. As with other exercises in urban planning and development, the City is endeavoring to coordinate a variety of commercial, residential, and recreational uses of land, with the hope that they will form a whole greater than the sum of its parts.⁵⁹

Thus, facilitating private action by use of the eminent domain power to the

financial assistance under Connecticut's Small Town Economic Assistance Program. *See id.*; CONN. GEN. STAT. ANN. § 4-66g (West 2007 & Supp. 2008).

52. *Kelo*, 545 U.S. at 478, 484.

53. *Id.* at 473.

54. *Id.* at 483.

55. *Id.* at 477.

56. *Id.* at 490-91 (Kennedy, J., concurring) (suggesting there may be occasions where the plan is a sham).

57. *Id.* at 484.

58. *Id.* ("Promoting economic development is a traditional and long-accepted function of government. There is, moreover, no principled way of distinguishing economic development from the other public purposes that we have recognized.").

59. *Id.* at 483 (footnote omitted).

specific satisfaction of the private actors in return for the secondary and tertiary benefits of economic activity within the town's borders is valid.⁶⁰

The greatest justification for the *Kelo* majority opinion is the difficulty, if not near impossibility, of defining "bright line" rules for whether a taking is valid.⁶¹ The Court, in effect, threw up its hands at the futility of determining a principled way to distinguish economic development from other recognized public purposes.⁶² The decision, however, is still deeply unsatisfying. Even if promoting economic development is a traditional, accepted function of government,⁶³ something still *feels* wrong with the exercise of eminent domain. The source of the continued dissatisfaction with the *Kelo* majority opinion is the lack of focus on the harm from the forced sale to property owners who are commercial and residential occupants of a neighborhood.⁶⁴ Even though the loss of the property's economic value is financially compensated, the compulsory aspect of the sale to the government and the loss of the ability to decide whether and when to sell are not compensated.⁶⁵

B. The Dissents—Anti-Subordination Obscured by Formalism in Search of a "Bright Line" Rule

The *Kelo* dissenting opinions were most concerned with the plight of private property owners in this new world of economic development and their inability to protect themselves during the redevelopment process.⁶⁶ According to the dissents, the Fifth Amendment's "public use" clause was intended as an anti-private command that would serve the interests of fairness by allowing the Court to police "bright lines" of valid and invalid takings. Dissenting Justices O'Connor and Thomas relied on the "bright line" of requiring some form of

60. *See id.*

61. *Id.* ("For more than a century, our public use jurisprudence has wisely eschewed rigid formulas and intrusive scrutiny in favor of affording legislatures broad latitude in determining what public needs justify the use of the takings power.").

62. *See id.* at 484 ("There is . . . no principled way of distinguishing economic development from other public purposes.").

63. *See id.* ("Promoting economic development is a traditional and long-accepted function of government.").

64. *See id.* at 475 ("Ten of the parcels are occupied by the owner or a family member; the other five are held as investment properties.").

65. *See* Lee Anne Fennell, *Taking Eminent Domain Apart*, 2004 MICH. ST. L. REV. 957, 962-67 (2004) (discussing the uncompensated increment). *But see* Nicole Stelle Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 130-36 (2006) (case study indicating that above-market compensation for takings occurs more often than is commonly thought).

66. *Kelo*, 545 U.S. at 496 (O'Connor, J., dissenting) (The public use clause's purpose is to protect "stable property ownership by providing safeguards against . . . unfair use of the government's eminent domain power—particularly against those owners who, for whatever reasons, may be unable to protect themselves in the political process against the majority's will").

actual physical public use or ownership.⁶⁷ Roads, hospitals, and military bases are of *clear, direct* public benefit because they are owned by the government. Stadiums, railroads, and utilities are *open to the public* so they too are of clear, direct public benefit.⁶⁸ The dissents diverged, however, over whether there could be any additional “exigency” that would also justify an exercise of eminent domain.⁶⁹ Justice O’Connor’s approved exigency was the goal of affirmative harm prevention.⁷⁰ Under this perspective, *Berman* and *Midkiff* were transformed from being based on deference to a public purpose into exercises of eminent domain for the purpose of harm elimination.⁷¹

Under either of the dissents’ categorical formulations, economic development takings are constitutionally impermissible.⁷² This formulation is not only impracticable, but also overly restrictive. First, the actual use/direct benefit standard simply invites comparisons between the new proposed uses and the approved list. In some places, this means that all exercises of eminent domain will be approved; in others, it means too many will be restricted. The test is not meaningfully more doctrinally beneficial. Second, by offering a finite list of approved “public” purposes justifying eminent domain, the dissenting and majority opinions all resort to tradition. The majority rests on economic development as a traditional local government project.⁷³ The significant

67. *Id.* at 497-98 (O’Connor, J., dissenting) (including the following as examples of appropriate takings: (1) public ownership; (2) actual use by the public [common carriers, railroad, a public utility, or stadium]; (3) and property that serves a public purpose and meets certain exigencies [and harm elimination]).

68. *Id.*

69. *See infra* notes 86-89 and accompanying text (Justice Thomas rejects the harm prevention exigency).

70. *Kelo*, 545 U.S. at 500.

71. *See id.* (citing the harm prevented in *Berman* as “blight resulting from extreme poverty and in *Midkiff* [as the harm of] . . . oligopoly resulting from extreme wealth”); *see also Kelo*, 545 U.S. at 486 n.16 (“Nor do our cases support Justice O’Connor’s novel theory that the government may only take property and transfer it to private parties when the initial taking eliminates some ‘harmful property use.’ There was nothing ‘harmful’ about the nonblighted department store at issue in *Berman*.”) (citation omitted).

72. Most dramatically, in this formulation of clear and rigid lines between valid public and invalid private uses, the O’Connor dissent argues for a two-pronged retreat from deference to all exercises of the police power arguing that the police power is not coterminous with public use. *Id.* at 501. This “errant language” is now said to derive from mistaken dicta in *Berman* and *Midkiff* that was not necessary to the actual holdings in those cases. *Id.* This language is extraordinary since the *Berman* opinion was a direct response to the department store owner’s claim that his property was not harmful slum housing—it was commercial property in good condition. *Berman v. Parker*, 348 U.S. 26, 31 (1954). Thus, in *Berman*, there needed to be a rationale offered as to why the scope of the redevelopment power could expand to include the functioning store when the direct problem was dilapidated alley housing in a small section of the quadrant.

73. *See id.* at 484 (“[E]conomic development is a traditional and long-accepted function of government.”).

difference is that the dissent's proposed categorical standard of review is troublingly similar to *Agins v. City of Tiburon*'s⁷⁴ "substantially advances" regulatory takings test. The dissent's categories represent judicially approved notions of appropriate projects that the Court implicitly approves as substantially related to legitimate public purposes. Because the Court repudiated the "substantially advances" test in *Lingle v. Chevron*,⁷⁵ the dissent would put eminent domain doctrine in a dilemma. Under the dissent's formulation, an uncompensated regulatory taking would be subjected to a more deferential standard of review, while a compensated physical taking would be subjected to a heightened, standard-less, standard of review.

On the other hand, the dissent better acknowledges the difficulty of the public-private split. Justice O'Connor aptly points out that due to the merger of public and private, it is pointless to divine illicit purely private purposes.⁷⁶ In economic development takings, "private benefit and incidental public benefit are, by definition, merged and mutually reinforcing."⁷⁷ O'Connor's dissent also correctly rejects looking solely at the city's motive to divine the true benefits to the city: "How much the government does or does not desire to benefit a favored private party has no bearing on whether an economic development taking will or will not generate secondary benefit for the public."⁷⁸

While Justice O'Connor correctly identifies one type of public/private chimera, she misses another. The types of underlying redevelopment supporting the exercise of eminent domain that would meet her approval include railroads, roads, and stadiums as valid public uses.⁷⁹ Private companies built those railroads for their own profit and wielded great power in the states where the railroad tracks were run.⁸⁰ Justice O'Connor's stadium example illustrates the illusory certainty of the public-private distinction, since most stadiums, even though publicly financed, are built at the behest of private sports team-owners, according to their specifications. Thus, the stadiums usually include expensive luxury skyboxes, which are inaccessible to the public, to meet team owners' private profit goals.⁸¹ The counter-intuitive conclusion to be drawn from Justice O'Connor's stadium example is that perhaps the public role in building these

74. 477 U.S. 225, 260 (1980), *abrogated by* *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

75. 544 U.S. 528, 542 (2005).

76. *Kelo*, 545 U.S. at 502-03 (O'Connor, J., dissenting).

77. *Id.* at 502.

78. *Id.*

79. *See id.* at 497-98.

80. *See* ALBERTA M. SBRAGIA, DEBT WISH: ENTREPRENEURIAL CITIES, U.S. FEDERALISM AND ECONOMIC DEVELOPMENT 48-50 (1996) (during the nineteenth century, cities and states competed to attract railroads by issuing bonds, on which they eventually defaulted, because of their desperate quest to avoid falling into oblivion by not having a railroad pass through their town).

81. *See* Peter Sepulveda, Comment, *The Use of the Eminent Domain Power in the Relocation of Sports Stadiums to Urban Areas: Is the Public Purpose Requirement Satisfied?*, 11 SETON HALL J. SPORT L. 137, 151 (2001) (contesting the publicness of publicly financed stadium development).

exclusive stadiums should not be considered public, but rather a further example of the impermissibly private.

Moreover, it is not possible to completely divorce the question of the validity of an exercise of eminent domain from the City's motive. Motives for redevelopment are particularly relevant since the touted benefits of economic development are based on projections that are often indirect, long-term, and incremental. Thus, motive is a way to evaluate whether the city's projections should be trusted. On the other hand, the reality is that local government often intends to benefit a favored private party, and that intention is actually part of the projected economic benefit. However, Justice O'Connor's dissent indirectly concedes that intention is, in fact, relevant because of the political process failures inherent in city redevelopment.⁸²

Although mired in the formalism of creating core categorical definitions of valid and invalid takings, the most apt observation in Justice O'Connor's dissent is that citizens in a redevelopment area are unable to protect their interests in the political process and indirectly acknowledge the problem of subordination. "The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more."⁸³ While O'Connor's dissent fails to elaborate, it comes within a hair's breadth of acknowledging the class subordination inherent in redevelopment. In light of the Court's past unwillingness to acknowledge class as a basis for Equal Protection, this acknowledgment is actually significant.⁸⁴ It is the opening for a conversation on how the Constitution should respond to systematic local political process failures and the resulting wealth-based inability to resort to democratic devices for voice,

82. Justice O'Connor correctly argues that federalism protects important state functions, but federalism seems out of place here since it does not provide protection for citizens. The Tenth Amendment is not a Constitutional provision "meant to curtail state action." *Kelo*, 545 U.S. at 504 (O'Connor, J. dissenting). While I agree, one cannot avoid the reality that *Kelo*'s federalism rationale (i.e., returning the issue to the states) has really galvanized extremely important local political activism as well as spurred others to begin questioning the wisdom of economic development activities. For an account of the typical local reaction to eminent domain, see Jennifer Egan, *A Developing Story*, N.Y. TIMES, Feb. 24, 2007, at A15 ("[R]esignation and bitter apathy afflicted many residents, who disliked the project but felt that it was unstoppable. What chance do we have . . . when our mayor, governor and borough president are in lockstep with a private developer?").

83. *Kelo*, 545 U.S. at 505 (O'Connor, J., dissenting).

84. See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-19 (1973) (rejecting "wealth discrimination" in property-tax based school funding as a basis for suspect classification and strict scrutiny). According to the Court, it was not feasible to do so without confronting "hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms, and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence." *Id.* at 19.

redress, or protection. Unfortunately, the categorical public-use approach as a protection for individual property rights provides inadequate conceptual space to focus on the problem of local political process defects and does not explore possibilities for addressing it.

Surprisingly,⁸⁵ Justice Thomas's dissent comes the closest to directly engaging issues of subordination present in redevelopment. He declines to approve harm elimination or "blight" takings.⁸⁶ Justice Thomas, like Justice O'Connor, applies an actual use standard⁸⁷ and finds that economic development never outweighs residents' property ownership rights.⁸⁸ However, in areas that would be labeled as "blighted," he would only allow eminent domain to be used if the supposed harmful land uses failed to meet a common law nuisance standard.⁸⁹ This issue is important since the flurry of post-*Kelo*, state anti-eminent domain reform legislation has retained blight as an acceptable justification, without regard to the subordination of eminent domain. Instead, Justice Thomas's view accounts for both the wealth and race subordination inherent in redevelopment.⁹⁰ He notes the systematic likelihood that "poor communities" will bear the brunt of economic development takings⁹¹ beyond any financially compensable level.⁹² He argues for heightened judicial review based on footnote four of *Carolene Products*.⁹³

The deferential standard this Court has adopted for the Public Use Clause is therefore deeply perverse. It encourages "those citizens with disproportionate influence and power in the political process, including

85. See Angela Onwuachi-Willig, *Just Another Brother on the Set?: What Justice Clarence Thomas Teaches Us About the Influence of Racial Identity*, 90 IOWA L. REV. 931 (2005) (arguing that Justice Thomas's jurisprudence falls within a tradition of Black conservative thought, which condemns Black criminal defendants' rights in favor of Black victims' rights and seeks to protect Black people from the stigma of affirmative action).

86. *Kelo*, 545 U.S. at 519-20 (Thomas, J., dissenting) (arguing that slums can be handled under state nuisance law).

87. *Id.* at 512 (referring to "quintessentially public goods").

88. See *id.* at 512-14.

89. *Id.* at 520.

90. *Id.* at 521.

91. *Id.* ("Allowing the government to take property solely for public purposes is bad enough, but extending the concept of public purpose to encompass any economically beneficial goal guarantees that these losses will fall disproportionately on poor communities. Those communities are not only systematically less likely to put their lands to the highest and best social use, but are also the least politically powerful.").

92. *Id.* ("[N]o compensation is possible for the subjective value of these lands to the individuals displaced and the indignity inflicted by uprooting them from their homes.").

93. *Id.* at 521-22 ("If ever there were justification for intrusive judicial review of constitutional provisions that protect 'discrete and insular minorities,' surely that principle would apply with great force to the powerless groups and individuals the Public Use Clause protects." (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938))).

large corporations and development firms” to victimize the weak.⁹⁴

Influenced by the inherent class discrimination in redevelopment, Justice Thomas’s dissent argues that the power of government should be restricted to prevent its powers from being used by the rich to the disadvantage of the poor. Thus, Thomas’s dissenting opinion, while advancing an impracticable test, correctly formulates the challenges of local economic development. As currently practiced, local economic development raises fundamental questions about the discretion of states and cities to use land to effectuate policy choices at the expense of the poor.

C. *Stepping Back to Survey the Glittering Landscape of Redevelopment*

The type of contemplated development in *Kelo* is not simply limited to New London. Similar projects, both large and small, are occurring in cities and suburbs around the world. Development of upscale tourist, residential, and commercial amenities and twenty-first century core growth industries, such as high-tech service industries, health care, and institutions of higher education are part of a prevailing approach to seeking economic vitality—the “attraction of the affluent.” While these projects can be found in residential districts with serious abandonment problems that are still owner and tenant occupied,⁹⁵ much redevelopment does not necessarily involve occupied property; it can also be vacant brown or grayfield redevelopment.⁹⁶ Dilapidated downtown districts in

94. *Id.* at 522 (citation omitted).

95. The Biotech Approach. For example, on the east side of Baltimore, a thirty-acre residential neighborhood is being transformed with the help of the city’s eminent domain powers into a biotechnology park in a depressed section of the city, adjacent to Johns Hopkins. See Brief for Mayor & City Council of Baltimore as Amici Curiae Supporting Respondents at *25, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 166940. The plan is for the two million square-foot center to be used for research and business activities that will complement existing work at Johns Hopkins. *Id.* Estimates are that the development will create 6000 new jobs. “Of the approximately 1,700 total properties that the City expects to acquire in East Baltimore, approximately 1,150, or about two-thirds, are abandoned, while approximately 550 are currently—or recently-occupied private homes or businesses.” *Id.*

96. The New Private City Approach. In Atlanta, Atlantic Station, for example, consists of offices, condominiums, loft-style apartments, town homes, single-family residences, a variety of shopping ranging from IKEA to an upscale Dillards Department Store, multiplex cinema, cafes, restaurants, and bars.

The . . . development will ultimately include 6 million square feet of ultramodern Class A office space; 5000 residential units (from luxury condo lofts to more affordable townhouses and apartments); 2 million square feet of retail and entertainment space, including restaurants and movie theaters; 1000 hotel rooms, and 11 acres of public parks.

Lisa Chamberlain, *Square Feet: Building a City Within the City of Atlanta*, N.Y. TIMES, May 24, 2006, at C8. Its size encouraged the Postal Service to award the neighborhood its own ZIP code: 30363. See Jamie Gumbrecht, *Cracking the Zip Code of Atlanta Cool*, ATLANTA J. CONST., Apr.

need of rehab can be involved,⁹⁷ as well as districts suffering from vacancy but serving as a vital source of livelihood for small entrepreneurs.⁹⁸ Most of the redevelopments are mixed use.⁹⁹ It is nearly impossible across the broad array

25, 2008, available at www.ajc.com/living/content/living/stories/2008/04/25/zipcodes_0427.html. One 242-unit, four-story apartment building, Icon Apartments, will have a 20 percent affordable living component. Debra Wood, *Momentum Builds at Atlantic Station*, SOUTHEAST CONSTR. (2005), available at http://www.southeast.construction.com/features/archive/0506_Feature3.asp.

97. The New Private Downtown Approach. Attempting large-scale redevelopment on property privately owned by multiple parties is fraught with difficulty. For example, the city of Baltimore has been trying to get an ambitious redevelopment of its core downtown commercial district which has been in decline and long-abandoned by major retailers. The project seeks to acquire and transfer to private developers 100 properties owned by a variety of entities. See *West Side Story: What's at Stake in the Rush to Redevelop Baltimore's Original Downtown*, BALT. CITY PAPER, June 7, 2002, available at <http://www.citypaper.com/news/story.asp?id=3592>. The plan has unfolded slowly. Some early projects like the renovation of the Hippodrome Theater and the Center Point apartment and office complex are completed. Lorraine Mirabella, *West-Side Project Meets Resistance; City Preservationists Say Old Retail District Should Be Saved*, BALT. SUN, Dec. 12, 2008, at 16A. For the most part, however, the project has stalled for a number of reasons. There was initial opposition for failing to include historic preservation in the redevelopment plan. Charles Belfoure, *In Baltimore's West Side, Preservation Story Unfolds*, N.Y. TIMES, Feb. 18, 2001, at A11; Tom Chalkey, *West Side Glory*, BALT. CITY PAPER, Feb. 2, 2000, available at <http://www.citypaper.com/news/story.asp?id=2498>. There has been opposition from property owners and small business owners who claim they were not included in any part of the planning. The project has been the subject of three lawsuits over failure to make information available to bidders to be the developer, minority contractors alleging failure to comply with public contracting requirements, and a dispute by another failed bidder alleging mistaken inclusion of a key property in the redevelopment plan. See Eric Siegel & Jill Rosen, *Lawsuit Targets West-side Projects; Angelos, Developer Want City to Scrap Superblock Deal*, BALT. SUN, Feb. 27, 2007, at 1A.

98. According to one account, "The unlovely storefronts of the old west side are crammed with thriving businesses, most of them owned by Asian immigrants and African-American entrepreneurs who are, to paraphrase Bill Clinton's line, working hard and playing by the rules." Chalkey, *supra* note 97.

99. Examples include the Atlantic Station project in Atlanta, Georgia, the 138-acre mixed-use brownfield redevelopment on the site of Atlantic Steel, a former metals-recycling business. See, e.g., James Murdock, *Next Stop: Atlantic Station*, COMMERCIAL PROPERTY NEWS, Aug. 1, 2003, available at <http://www.allbusiness.com/operations/facilities-commercial-real-estate/4422322-1.html>. Waterfront redevelopment is extremely popular as well. In the Washington, D.C., metropolitan area, not one but two redevelopments are currently underway, unrelated but relatively close to each other. For example, the traditionally Black section of Southeast is slated to be transformed along its waterfront, along the Anacostia River in Washington, D.C., as part of the *Anacostia Waterfront Initiative*. See *Anacostia Waterfront Initiative*, http://www.planning.dc.gov/planning/cup/view,a,1285,q,571105,planningNav_GID,1708,planningNav,1323411.asp (last visited Mar. 12, 2009). This project consists of a 2800-acre development along the Potomac River comprised of ten different sub-projects, including a new baseball stadium for the Washington Nationals, a 20-mile Riverwalk Trail System, Kenilworth/Parkside (described as "a Mixed-Income,

of settings to characterize these developments as good or bad, positive or negative. Instead, they simply *are*. The significance is that regardless of whether or not direct displacement occurs, exclusion is inherent in these projects.

Large redevelopment projects will likely involve the exercise of eminent domain, but they also may not. If eminent domain is not exercised, this development would be characterized as seemingly *purely private* in terms of site acquisition and construction-financing, yet the City always plays a role in facilitating or making that redevelopment possible.¹⁰⁰ As argued elsewhere,¹⁰¹ eminent domain is only a subset of the governmental powers that are used to further development. The government's role in facilitating private development is ubiquitous and multiple. What is noteworthy is that when the government uses the eminent domain power, the government's motive is often to intervene and further land exchange value, rather than the use value placed on land by existing property owners and other residents.¹⁰² This further begs an alternate explanation of the rights and interests at stake beyond property rights conceptualizations.

Mixed Use Gateway to the Ward 7 Waterfront"), with 2000 residential units and 500,000 square feet of commercial and retail space. Office of the Deputy Mayor for Planning and Economic Development, Anacostia Waterfront, <http://dcbiz.dc.gov/dmped/cwp/view,a,1365,q,605699,dmpedNav,33026.asp> (last visited Feb. 28, 2009). The issue is not necessarily displacement, but who will get to partake in the new residential and commercial amenities. If the redevelopment is successful, it will make this area desirable and likely to gentrify. A few miles to the south, in Oxon Hill, Maryland, a massive waterfront development, National Harbor, is nearing completion. National Harbor, <http://www.nationalharbor.com/consumer/consumer.htm> (last visited Jan. 12, 2009). Loosely reminiscent of Baltimore's Inner Harbor, National Harbor is a 300-acre planned upscale tourist, entertainment destination centering around a colossal convention center with an eighteen-story glass atrium featuring a dramatic view of the Potomac River. *Id.* The Center is surrounded by upscale hotels, condominiums, shopping and restaurant venues along with ample parking. *See id.*

Redevelopment is also part of stadium development. For example, eminent domain was used to condemn both vacant and occupied property for a new stadium for Washington, D.C.'s, new baseball team, the Washington Nationals. Dana Hedgpeth, *Contesting a Stadium's Power*, WASH. POST, Feb. 20, 2006, at D03 (detailing the \$600 million in city financing for the new baseball stadium and land speculation in anticipation of the exercise eminent domain).

100. *See, e.g.,* Lynne B. Sagalyn, *Public/Private Development: Lessons from History, Research, and Practice*, 73 J. AM. PLAN. ASSN. 7, 10 (2007) (discussing the public-private nature of redevelopment); Marc B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court: Kelo v. City of New London*, VT. J. ENVTL. L. 41 (2005).

101. *See* Audrey G. McFarlane, *The New Inner City: Class Transformation, Concentrated Affluence and the Obligations of the Police Power*, 8 U. PA. J. CONST. L. 1 (2006) [hereinafter McFarlane, *The New Inner City*].

102. Rachel Weber, *Extracting Value from the City: Neoliberalism and Urban Redevelopment*, in SPACES OF NEOLIBERALISM: URBAN RESTRUCTURING IN NORTH AMERICA AND WESTERN EUROPE 172, 174, 182 (Neil Brenner & Nik Theodore eds., 2002) (describing how developers, assisted by the State, pursue creative destruction in order to extract the economic value from fixed assets like real estate).

One of the most controversial large redevelopment projects currently underway is the Atlantic Yards Arena and Redevelopment Project in the Prospect Heights neighborhood of Brooklyn, New York.¹⁰³ This is a twenty-two-acre redevelopment of underutilized and underdeveloped rail yards and other properties in the midst of a thriving Brooklyn neighborhood.¹⁰⁴ The planned mixed-use development will include sixteen towers with more than 6000 units of rental housing, with fifty percent set aside for low and middle income renters,¹⁰⁵ four office buildings, a glass-walled sports arena (for the New Jersey Nets) to be designed by renowned architect Frank Gehry, a hotel, and six to seven acres of open space.¹⁰⁶ The City will use eminent domain to clear parts of the neighborhood.¹⁰⁷

One view of redevelopment is that both privately and publicly sponsored redevelopment is crucial to allow cities to adapt to changing economic and demographic conditions and to revamp and update outdated land uses and buildings to meet a changing society's needs.¹⁰⁸ The other view—more difficult to articulate because the new developments are often dramatically beautiful—is

103. Charles V. Bagli, *City Planners Recommend 8% Reduction in Atlantic Yards*, N.Y. TIMES, Sept. 26, 2006, at B3.

104. See Nicholas Confessore, *Another Step for Downtown Brooklyn Project*, N.Y. TIMES, Dec. 16, 2005, at B10 (describing some of the properties such as repair shops, a food supply store, and abandoned residential apartment buildings as dilapidated); Nicholas Confessore, *Cities Grow up, and Some See Sprawl*, N.Y. TIMES, Aug. 6, 2006, at 43 (the site is located “where a mix of vacant lots, low-rise apartments, abandoned buildings, and condominiums now sit”); Peter Slatin, *Yard Fight*, SLATIN REPORT, July 8, 2005, available at http://www.nolandgrab.org/archives/2005/07/yard_fight.html (discussing a rival proposal by the Extell Group for a more modest purely residential development that would have built on existing yards footprint and avoided use of eminent domain); see also *Goldstein v. Pataki*, 516 F.3d 50, 52 (2d Cir. 2008) (“[R]edevelopment of an area in downtown Brooklyn affected with substantial blight.”).

105. This arrangement is pursuant to a “community benefits agreement” between the developer and a variety of community organizations. See Nicholas Confessore, *Perspectives on the Atlantic Yards Development through the Prism of Race*, N.Y. TIMES, Nov. 12, 2006, at 35.

106. See Jennifer Egan, *A Developing Story*, N.Y. TIMES, Feb. 24, 2007, at A15 (lamenting: “What was mostly lost in this caustic debate was the biggest question of all: what do we Brooklynites—a diverse and even divided collective—want our borough to be? Do we want it transformed from a sunny, low-lying place into knots of vertical superblocks? Are we content to let our borough’s future be imposed on us by developers and politicians?”).

107. A recent challenge to the exercise of eminent domain was rejected at the trial court level. *Goldstein v. Pataki*, 488 F. Supp. 2d 254, 278 (E.D.N.Y. 2007) (“Plaintiffs have not sufficiently alleged that the takings at issue violate the public use requirement.”), *aff’d*, 516 F.3d 50 (2d Cir.), *cert. denied*, 128 S. Ct. 2964 (2008); Jotham Sederstrom, *Yards Sued on Plan to Grab Land*, N.Y. DAILY NEWS, Feb. 8, 2007, at 1 (“While opponents fear the project will create a traffic nightmare and ruin the neighborhood’s character, supporters say it will create jobs and affordable housing.”).

108. According to Rachel Weber, this redevelopment is about prioritizing the exchange value placed on inner-city communities rationalized by neo-liberal ideology. Weber, *supra* note 102, at 175-76.

that not enough attention is paid to how these changes impact the urban social fabric by creating consistent winners and losers. The consumption needs and tastes of the affluent are prioritized in this form of development. The rejection of older, less-upscale, land uses becomes personal, class-based, and seemingly subjective.¹⁰⁹

This unfairness is starkly apparent, purposefully fostered by the market, and insufficiently addressed by the cities. Local economic development, as currently practiced, raises fundamental questions about the discretion of States and Cities to use land to effectuate social and economic policy choices. The history of redevelopment is notorious because society's needs are contested and subjective, often colored by narrow perspectives, racism¹¹⁰ and classism.¹¹¹ These questions cannot be separated from the eminent domain equation. While the majority opinion is persuasive in stating that "bright line" limits cannot, and should not, be read into the public use clause to limit government overreaching in the name of economic development, does that mean there can be no limits? While the public good is the stated goal, the broad range of choices for defining the public good and meeting that goal means that much can happen that can have negative consequences for ordinary city residents.

Eminent domain doctrine can grapple more meaningfully with the underlying issues presented through some exercises of eminent domain by assessing the subordination inherent in redevelopment. The public or private label assigned to the eminent domain decisionmaker or ultimate owner does not truly affect or change the subordination. Because the current debate on redevelopment is

109. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 25 (1973) (refusing to apply strict scrutiny to economic or wealth discrimination challenge to property-tax based school funding disparities). The poor "have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28. See *James v. Valtierra*, 402 U.S. 137, 140-41 (1971) (declining to extend the protection of the Equal Protection Clause against a referendum requirement for "low rent" housing developments.); Carl Bialik, *The Numbers Guy: Flaws in Measuring the World's Poor May Hinder Solutions*, WALL ST. J., June 1, 2007, at B1 (noting criticism of World Bank global poverty numbers being compiled by cumulating national poverty statistics—"some economists argue that poverty should be defined as the inability to live at a level each person's society deems normal. Lacking a phone in Burundi might not be associated with poverty, but it is in the [United States]").

110. David Crump, *Evidence, Race, Intent and Evil: The Paradox of Purposelessness in the Constitutional Racial Discrimination Cases*, 27 HOFSTRA L. REV. 285, 315 (1998) ("[In polls] whites tend to use the word 'racism' to refer to explicit and conscious belief in racial superiority. African-Americans mean something different by racism: a set of practices and institutions that result in the oppression of black people.").

111. See Bradley R. Schiller, *Class Discrimination vs. Racial Discrimination*, 53 REV. OF ECON. & STAT. 263, 268 (1971) (suggesting that class discrimination is as harmful and invidious as racial discrimination and concluding that poverty harmed Black AFDC recipients more than race).

conducted only through the jurisprudence of eminent domain, that discussion is too narrow. It only recognizes the individual property holder and is confined to the public-private distinction, thereby missing the heart of the issues presented by redevelopment. Crucial to a broadened, more realistic consideration of redevelopment is to account for the subordination inherent in this practice.

D. The Three Faces of Subordination in Redevelopment

1. *What Is Anti-Subordination?*¹¹²—Anti-subordination originates from the Fourteenth Amendment¹¹³ Equal Protection guarantee. While Equal Protection

112. Research reveals anti-subordination arguments advanced in hate speech (First Amendment), employment law (statutory), and education/desegregation/affirmative action law (Fourteenth Amendment). See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 174 (1987); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1004 (1986) (arguing that anti-subordination should inform courts' analysis of equal protection doctrine.); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 705 n.53 (1997) (noting Catharine MacKinnon's evolution from the term, "inequality approach" to "antisubordination"); see also Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW* § 16-21, at 1514, § 16-22, at 1521 (2d ed. 1988) (stating that the antidiscrimination principle focuses on acts of prejudice, whereas antisubjugation focuses on legally reinforced systems that treat some people as second-class citizens); Paul Brest, *Forward: In Defense of the Anti-Discrimination Principle*, 90 HARV. L. REV. 1, 6 (1976) (defining the antidiscrimination principle as one disfavoring classifications, decisions, and policies based on race and noting that other principles may be needed to address questions of economic justice); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1341 (1988) (arguing that society refuses to recognize the role of racial subordination) [hereinafter Crenshaw, *Race, Reform, and Retrenchment*]; Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 79-80 (1994); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1450-56 (1991) (applying antisubordination principles to the actions of some state governments in criminally prosecuting pregnant drug addicts); accord Karen B. Brown & Mary Louise Fellows, *Introduction*, in *TAXING AMERICA* 1, 2 (Karen B. Brown & Mary Louise Fellows eds., 1996) ("What is missing from both the political and the academic debate about taxes is a serious consideration of how the tax system exacerbates marketplace discrimination against traditionally subordinated groups."); Karen B. Brown & Mary Louise Fellows, *Preface*, in *TAXING AMERICA*, at vii, vii (Karen B. Brown & Mary Louise Fellows eds., 1996) (and advocating the development of "an analytical framework [that] would both uncover biases in the tax law and reveal anti-subordination strategies to keep the tax law from maintaining and perpetuating marketplace discrimination."); Samuel R. Bagenstos, *Subordination, Stigma, and "Disability,"* 86 VA. L. REV. 397, 452 (2000) ("By reading the ADA as extending its protections only to members of a particular socially subordinated group, I draw on the work of scholars who have articulated an antisubordination theory as both a description and defense of civil rights law.").

113. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST.

is typically thought of as being purely about equal treatment between properly defined, similarly situated categories of people, a rich literature argues convincingly that anti-subordination is the true substantive¹¹⁴ protection of the Equal Protection Clause. The normative goal is neither mechanically equal treatment nor merely avoidance of explicit racial classifications, but rather a guarantee that no citizens will be relegated to second-class status by virtue of societal structures, disadvantage, and oppressive treatment over time.¹¹⁵ At the core of anti-subordination logic is the recognition that numerical minorities are often literally incapable of protecting their interests in a majoritarian political process.¹¹⁶ However, the goal of anti-subordination is to recognize that subordination can be present, even in the absence of explicit racial classifications. An accumulation of social practices can act to create a caste-like, second-class-citizen status which then reinforces disadvantage.¹¹⁷ This was at the

amend. XIV, § 1.

114. See, e.g., John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2189 (1992) (“The point is that almost all the critical race theory literature seems to embrace the ideology of anti-subordination in some form.” (citing Crenshaw, *Race, Reform, and Retrenchment*, *supra* note 112, at 1341; Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1398-99 (1991)); Charles R. Lawrence III, *Forward Ace, Multiculturalism, and the Jurisprudence of Transformation*, 47 STAN. L. REV. 819, 822-28 (1995) (arguing that liberal individualist theory fails the cause of anti-racism and transformative humanization because it offers a nonsubstantive approach to racism that focuses exclusively on individual harms and procedural fairness rather than the disestablishment of ideologies, systems, and conditions of racial subordination); Charles R. Lawrence III, *Two Views of the River: A Critique of the Liberal Defense of Affirmative Action*, 101 COLUM. L. REV. 928, 942 n.51 (2001) [hereinafter Lawrence, *Two Views*].

115. Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*, 117 HARV. L. REV. 1470, 1477 (2004) (“Antisubordination values are not foreign to the modern equal protection tradition, but a founding part of it, deeply tempered by other values, including the need to have a Constitution that speaks to all.”); see Ian F. Haney López, “A Nation of Minorities”: *Race, Ethnicity, and Reactionary Colorblindness*, 59 STAN. L. REV. 985, 987 n.2 (2007) (“Many critics of the anticlassification approach argue instead that, properly understood, the Equal Protection Clause targets only those racial practices that contribute to racial hierarchy. The proponents of this antisubordination approach prominently include the following: J.M. Balkin . . . Owen M. Fiss . . . William E. Forbath . . . Reva Siegel . . .”) (citations omitted).

116. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). The infamous footnote serves as the basis of heightened judicial scrutiny of racial classifications. I have always thought it jurisprudentially odd that the source of protection for a subset of American citizens is in a footnote.

117. Sylvia R. Lazos Vargas, *Democracy and Inclusion: Reconceptualizing the Role of the Judge in a Pluralist Polity*, 58 MD. L. REV. 150, 162 (1999) (noting that separate but equal laws lead to “‘antisubordination,’ ‘antisubjugation,’ ‘anti-caste’ or ‘substantive equality.’”).

heart of the desegregation mandate of *Brown v. Board of Education*,¹¹⁸ for example. Segregation involved separate but equal treatment.¹¹⁹ By invalidating separate but equal, the Supreme Court explicitly recognized that equal treatment had a disparate negative effect on Blacks.¹²⁰ The concept of anti-subordination was that separate but equal created a disadvantaged, stigmatized status for members of particular racial groups and the Fourteenth Amendment needed to be interpreted in a way that addressed these forms of discrimination.¹²¹ Critical race theory was built on these insights into the limits of the anti-discrimination principle to consistently call for addressing elements of structural disadvantage—namely, subordination. These elements stem not from individual acts of discrimination, but rather from a series of seemingly non-discriminatory acts that keep particular groups of people disadvantaged.¹²²

Critical race theory teaches that subordination must be addressed when any of the following are present: 1) politically disabling power disparities;¹²³ 2) caste-like status; 3) failure to reflect the perspective of the subordinated;¹²⁴ or 4)

118. Siegel, *supra* note 115, at 1547 (“[I]t is a history of debates over *Brown* that shows how racial conflict haunts the silences, ambiguities, and conflicts of modern equal protection doctrine.”).

119. See Jack M. Balkin & Sanford Levinson, *Thirteen Ways of Looking at Dred Scott*, 82 CHI.-KENT L. REV. 49, 84 (2007) (“The Missouri Compromise barred slaveowners from bringing their slaves with them north of 36°30’ latitude, imposing what we today would call a ‘disparate impact’ on Southerners. Thus, *Dred Scott* not only makes an egalitarian argument for slaveholders rights, it also makes what we would today call an ‘antisubordination’ argument.”); Perry, *supra* note 112, at 79-80 (arguing that the discourse or manner of speaking about transracial adoption is subordinating). The goal of anti-subordination is not simply a society in which everyone is treated “equally” but rather a society in which each member is guaranteed equal respect as a human being.

120. See *Brown v. Bd. of Educ. (Brown I)*, 347 U.S. 483, 495 n. 11 (1954).

121. See Kathryn Abrams, “Groups” and the Advent of Critical Race Scholarship, at 10, available at <http://www.bepress.com/ils/iss2/art10> (last visited Feb. 21, 2009) (arguing that “Groups and the Equal Protection Clause” partially contributed to the emergence of critical race theory). But see David A. Strauss, “Group Rights” and the Problem of Statistical Discrimination, at 6, available at <http://www.bepress.com/ils/iss2/art17> (last visited Jan. 2, 2009) (arguing that the anti-subordination principle is not really something new or exotic).

122. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY & PUB. AFFAIRS 107, 108 (1976) (proposing to shift Equal Protection doctrine’s emphasis on racial classifications towards the actual social practices that disadvantage racial groups); see also Owen Fiss, Abstract, *Another Equality*, available at <http://www.bepress.com/ils/iss2/art.20/> (last visited Jan. 2, 2009).

123. See Richard Thompson Ford, *Geography and Sovereignty: Jurisdictional Formation and Racial Segregation*, 49 STAN. L. REV. 1365, 1367 (1997) (arguing that “[r]ecent Court decisions involving electoral district apportionment and a long-running, if disconnected, set of deliberations regarding local government directly implicate issues of group pluralism and subordination as they affect democratic institutions”); Perry, *supra* note 112, at 79 n.204 (citing and characterizing the arguments in Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1005-14 (1986)).

124. Lawrence, *Two Views*, *supra* note 114, at 950-51 (“Critics of liberal theory, including critical race theorists, have offered another way to think about promoting equality and human

systemic, reinforcing disadvantage. Additionally, anti-subordination is unapologetically and openly political. It does not pretend that politics and constitutional interpretation do not intermix.¹²⁵ However, anti-subordination theory has yet to meaningfully confront the real questions of social conflict that underlie its goal of social re-ordering,¹²⁶ and the constraints on courts and legislatures to detach themselves from the influence or control of that social conflict.¹²⁷ Reva Siegel has insightfully observed,

[I]t is evident why the Court and many of those defending its work began to shy from openly justifying equal protection decisions in language concerned with group inequality or associated concepts of subordination and status. Reasoning about practices that unjustly disadvantage groups, or enforce their inferior or *second-class status*, involves positive and normative claims of a politically provocative sort. As a descriptive matter, concepts of subordination focus attention on agonistic group relations that structure the polity. As a normative matter, concepts of subordination draw into question the legitimacy of customary practices and understandings that regulate, and rationalize, the social position of groups.¹²⁸

Siegel's critique is not made purely from the perspective that one person's gain is another's loss. Instead, it arises from the recognition that material resources are at stake and recognizing harm in a society has profound implications.¹²⁹

dignity, one that reflects the perspective of the subordinated.”).

125. See Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 4 (2006) (“[S]ocial and not legal change is what will be necessary to eliminate structural workplace inequalities.”); Calmore, *supra* note 114, at 2137-38 (arguing that critical race theory and jazz have similar origins in that both involve notions of oppositional cultural and political practices and potentially effective use of fundamental criticism of society); Mark Tushnet, *Popular Constitutionalism as Political Law*, 81 CHI.-KENT L. REV. 991, 991 (2006) (defining popular constitutionalism as “the deployment of constitutional arguments by the people themselves, independent of, and sometimes in acknowledged conflict with, constitutional interpretations offered and enforced by the courts”).

126. But see Rhonda V. Magee Andrews, *The Third Reconstruction: An Alternative to Race Consciousness and Colorblindness in Post-Slavery America*, 54 ALA. L. REV. 483, 530 n.199 (2003) (“[T]he antisubordination jurisprudence has remained associated with a concept of race that inevitably would perpetuate the notion in ways that reflect nineteenth century thinking Thus, the antisubordination principle has not yet led to an adequate critique of the notion of race itself, or to a reconsideration of the comparison-based approach implicit in equal protection analysis.”).

127. See Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641, 715 (1990); Robin West, Abstract, *Groups, Equal Protection and Law*, available at <http://www.bepress.com/ils/iss2/art8> (last visited Jan. 5, 2009) (arguing that the Equal Protection Clause provides political ideals to guide legislation, rather than legal restraints on legislation).

128. Siegel, *supra* note 115, at 1544-45 (emphasis added).

129. *Id.*

Siegel's theory seeks a re-allocation of rights and privileges.¹³⁰ Her critique also considers the profound aspects of identity that arise from privilege and a sense of vulnerability and threat of danger that accompanies privileged identities.¹³¹ The task, then, is to devise a way to make the process fair.

Even more complicating are the unresolved tensions between race and class. At present, eminent domain doctrine leaves racial minorities and others living in redevelopment areas to the urban political process.¹³² The reality is that minority elected officials are often in charge of carrying out redevelopment. The economic forces and logic driving that decisionmaking and its subordinating effect are largely unchanged by the decisionmaker's racial identity. A purely racial lens is insufficient to understand the nature of the subordination. Instead, race, class, and the political process—in particular, the informality of the political process in redevelopment—must be used to flesh out an understanding of the subordination. Anti-subordination theory is complex, multi-dimensional, and capable of adapting,¹³³ and when applied to eminent domain, provides an opportunity to consider what redevelopment is and should be about.

2. *Subordination in the Types of Redevelopment Projects.*—Redevelopment seems like a straightforward process of acquiring and clearing a site and

130. *Id.*

131. For example, Reva Siegel makes a helpfully inductive observation about the impact of social conflict on the retreat of the Supreme Court from the anti-subordination principle. She argues that “[i]n deciding *Brown*, the Court had adopted an interpretation of the Equal Protection Clause that would alienate groups with the social standing and skills to challenge the authority of the Court itself.” *See id.* at 1544. She continues,

As the Court read the Constitution to draw into question the position and values of whites who sought to maintain segregation, they in turn charged the Court with illegitimacy and group partiality. Under assault, the Court needed more than a principled justification for its interpretive practice. It needed an account of the Constitution that could command the allegiance—if not the assent, then the engaged dissent—of those the Court's decisions had estranged.

Id.

132. Darren Lenard Hutchinson, “*Unexplainable on Grounds Other than Race*”: *The Inversion of Privilege and Subordination in Equal Protection Jurisprudence*, 2003 U. ILL. L. REV. 615, 682 (“Of the possible equal protection theories, the antistatist or anticaste theories do more to dismantle the historical legacy of racial and other forms of domination. Many scholars have advocated antistatist theories. A concern that the law promote substantive equality by considering ‘the concrete effects of government policy on the substantive condition of the disadvantaged’ unifies their analyses.” (quoting Roberts, *supra* note 112, at 1454)). Hutchinson also argues that the approach leaves minorities to the political process. *Id.*

133. Darren Lenard Hutchinson, *Identity Crisis: “Intersectionality,” “Multidimensionality,” and the Development of an Adequate Theory of Subordination*, 6 MICH. J. RACE & L. 285, 288 (2001) (drawing from race-sexuality theory and calling for a multi-dimensional antistatist theory noting “structural problems in antistatist theory . . . [that positions] progressive movements as oppositional and conflicting forces, rather than as potential alliances and coalitions, and the failure to recognize the multidimensional and complex nature of subordination”).

constructing a set of buildings to create a new use for the property. Nevertheless, this process also involves practices related to group formation and social exclusion, as well as oppression and domination. Redevelopment involves *social decisions* about land use that significantly alter property ownership patterns, neighborhoods, and community networks.¹³⁴ Because redevelopment occurs in furtherance of an upper-middle-class attraction strategy, the policy, in effect, prioritizes the land use needs of one social class over the other.¹³⁵

The similarity of these glittering new projects to each other is striking.¹³⁶ Not only is mixed-use (commercial and residential) development the wave of the present, but upscale residential and commercial developments are the standard of the day. One advantage of mixed-use development is it provides nearly all that young urban dwellers want—proximity to services and entertainment, excitement, walkability, upscale convenience, and controlled environment. The main disadvantage of mixed-use development is that it is usually market-driven. The residential tenant mix is expected to predict, match, and enable the commercial tenant mix. Although non-upscale development can be profitable, it is omitted from most redevelopment schema because it does not “fit the profile.”¹³⁷

There are underlying structural reasons for the similarities of these developments. Developers replicate the same schemas because they are forced to tell a cognizable story that financial markets easily understand.¹³⁸ Prevailing financing mechanisms require this exclusion to replicate the limited recognized types of real estate investment products. Failure to replicate makes financing more expensive or even unavailable.¹³⁹ Financing demands predictable, standardized forms of development. According to Christopher Leinberger, nineteen standard real estate products are used by real estate developers to produce developments that banks and other investors can readily recognize and

134. See Mihaly, *supra* note 5, at 4 (stating that “redevelopment [is] one of the most powerful roles assigned to government”).

135. For a more complete discussion of this point, see McFarlane, *The New Inner City*, *supra* note 101, at 3; see also Herman L. Boschken, *Global Cities, Systemic Power, and Upper-Middle-Class Influence*, 38 URB. AFF. REV. 808, 808 (2003) (an “important consideration in urban globalization is the disproportionately high presence of UMC whose membership includes institutional professionals at the forefront of postmodern awareness and international experience. Symbolized by a lifestyle genre, the upper middle class is more than a marker of the global city. It exerts a subliminal influence that prescribes the cityscape policy that outcomes planners emphasize to ensure principal membership for the city in global exchange”).

136. See *supra* Part I.C.

137. See MARY PATILLO MCCOY, *BLACK PICKET FENCES* 190 (1999).

138. MICHAEL SUK-YOUNG CHWE, *RATIONAL RITUAL: CULTURE, COORDINATION, AND COMMON KNOWLEDGE* 25-49 (2001) (discussing ritual, common knowledge and the need to stigmatize).

139. See Christopher B. Leinberger, *Back to the Future: The Need for Patient Equity in Real Estate Development Finance*, BROOKINGS INSTITUTION RES. BRIEF, Jan. 2007, at 1, 7.

use to calculate the risk of financing or investment.¹⁴⁰ Building projects must conform to one of these standard real estate product types or financing becomes significantly more expensive. The problem is further exacerbated because real estate financing is globalized, and distant investors in real estate investment trusts (REITs) demand certain types of development (i.e., the product) that produce quick returns. Not only does this lead to standardization (typically upscale), but this homogenization leads to conservatism in decisionmaking about the types of development to pursue.¹⁴¹

This lack of “non-upscale” development is also partly due to the lack of subsidy to provide incentive for affordable, accessible development.¹⁴² The historic, judicially ratified opposition to multifamily housing in zoning ordinances and land use decisionmaking indicates that the shortage of *non-upscale* development is not solely a question of financial cost.¹⁴³ Even when financial support is available for building accessible development, it will often be opposed on race and class grounds. As Sheryll Cashin argues, property owners have a financial stake in opposing development that might negatively impact their property values.¹⁴⁴ However, this opposition is also likely due to the stigmatization of certain social groups. The uniformity of these redevelopment schemas contains an ideology of exclusion and inclusion.¹⁴⁵ Therefore, a better accounting of the social psychology and political economy of exclusion is needed.¹⁴⁶ These often “cookie-cutter” developments practice social

140. See Christopher B. Leinberger, *The Need for Alternatives to the Nineteen Standard Real Estate Product Types*, PLACES, July 2005, at 24, 24.

141. Jeffrey H. Epstein, *Advertisers Divide and Conquer*, FUTURIST, Mar. 1998, at 2, 16 (reviewing Joseph Turow and arguing that the prevalence of marketing to segments is splitting the social order: “radio, magazines, and cable television . . . in particular are more segmented than ever. Relatively little content . . . is aimed at a demographically broad audience. People increasingly filter their view of the world through these defined media experiences. One reason for the marketing is that segmentation increases the likelihood that the targeted consumer will experience a sense of personal identification with a product’s image and therefore feel an interest in purchasing and using it”). What concerns Turow most are the secondary impacts on society—the invisible walls of isolation created by the comfort zones of similarity. See JOSEPH TUROW, *BREAKING UP AMERICA: ADVERTISERS AND THE NEW MEDIA WORLD*, at ix (1997).

142. See J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 531 (2007) (detailing eight possible and potentially conflicting objectives of subsidized housing: “1) decent shelter; 2) wealth creation; 3) social integration; 4) urban vitality; 5) civic engagement; 6) training; 7) institution building; and 8) efficient use of public funds”).

143. See, e.g., *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386-88 (1926).

144. SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* (2004).

145. See Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1850-53 (2006) (exploring strategies to exclude indirectly by creating exclusionary vibes or constructing developments with exclusionary amenities).

146. See Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA.

differentiation with exclusion as the accepted development model through the use of clusters and geo-demographic profiling.¹⁴⁷ Target marketing in particular locations leads to stigma¹⁴⁸ and disdain.¹⁴⁹ Clusters facilitate exclusion by allowing specific targeting of demographic groups.¹⁵⁰ Society has not yet fully appreciated how such target marketing divides instead of unites.¹⁵¹ Class and performance are made increasingly more important because of the rise of mass affluence.¹⁵² Citizens have been trained to be consumers; to desire, fantasize, and “fetishize” market segmentation. Whereas a greater number of people depend on open access to public recreational opportunities, the rise of mass affluence

L. REV. 437, 454-55 (2006) (extending the indirect exclusionary argument to clubs and neighborhoods).

147. See generally IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE (1990); IRIS MARION YOUNG, INCLUSION AND DEMOCRACY (2002).

148. See Robert J. Sampson & Stephen W. Raudenbush, *Seeing Disorder: Neighborhood Stigma and the Social Construction of “Broken Windows,”* 67 SOC. PSYCH. Q. 319, 319 (2004) (Perceptions of disorder increase based on race and class identity. “Seeing disorder appears to be imbued with social meaning . . . generating self-reinforcing social processes that may help account for the perpetuation of urban racial inequality.”).

149. Stigma or stigmatization “refers to an invisible sign of disapproval which permits insiders to draw a line around ‘outsiders’ in order to demarcate the limits of inclusion in any group.” GERHARD FALK, STIGMA: HOW WE TREAT OUTSIDERS 17 (2001). According to Falk, the American ideology derived from the Protestant ethic

includes the belief that individual hard work leads to success and that lack of success is caused by moral failings, self-indulgence, and a lack of self-discipline Americans are likely to take credit for any outcomes in their lives which can be viewed as successful and generally approved. Consequently . . . those among us who deviate from the Protestant work ethic will be stigmatized and . . . most Americans, will severely reject those who deviate from these norms the most.

Id. at 334.

150. This is why Costco in Seattle has a massive coffee machine for fresh ground coffee but does not carry jumbo containers of curry as does the Costco in the Washington, D.C., area. See MICHAEL J. WEISS, THE CLUSTERED WORLD: HOW WE LIVE, WHAT WE BUY AND WHAT IT ALL MEANS ABOUT WHO WE ARE 9-13 (2000) (using census data, zip codes, and marketing surveys to classify people into lifestyle segments based on: (1) where they live—whether in a city, small town, or rural area; (2) their lifestage—whether they are young and single, married with children, or a retiree; and (3) their marketplace behavior). But see John T. Metzger, *Clustered Spaces: Racial Profiling in Real Estate Investment*, LINCOLN INST. OF LAND POL’Y CONF. PAPER 15-16 (2001) (arguing that racial segregation is replicated in the use of clusters in real estate investment; discussed more extensively in Audrey G. McFarlane, *Who Fits the Profile?: Thoughts on Race, Class, Clusters, and Redevelopment*, 22 GA. ST. U. L. REV. 877 (2006)).

151. See generally TUROW, *supra* note 141, at 1-2 (arguing that segmented marketing emphasizes divisions rather than overlap).

152. See generally PAUL NUNES & BRIAN JOHNSON, MASS AFFLUENCE: SEVEN NEW RULES OF MARKETING TO TODAY’S CONSUMER 29-58 (2004) (discussing contemporary middle class consumer logic and demands for luxury).

(financed by credit card debt) means that a huge number of people adopted the attitudes and preferences of aristocracy or royalty. In turn, their consumer demand for exclusion is built into the consumer market for commodities. The home is a cultural commodity, and the ability to stigmatize anyone who challenges the fantasy by being too different threatens property values. Since types of homes determine types of commercial amenities, types of development will likely subordinate certain non-affluent people by developing in ways that exclude their needs and interests.

3. *Subordination in the Location of Redevelopment.*—Renowned playwright August Wilson wrote ten plays chronicling the Black American experience through each decade of the twentieth century.¹⁵³ Nearly all of these plays were set in the Hill District, a Black neighborhood in Pittsburgh.¹⁵⁴ In three of these plays, set during the 1960s, 1970s, and 1990s, the characters struggle with the universally human quest to cope with and make sense of life's challenges.¹⁵⁵ One additional ongoing challenge present in two of the plays, *Jitney* and *Two Trains Running*, is the threat of urban renewal displacing the characters from their homes and businesses.¹⁵⁶ In Wilson's final play, *Radio Golf*, the challenge of urban renewal was renamed economic development. The play centers around the efforts of one character—a politically well-connected affluent Black developer—to displace an elderly Black homeowner to make way for a Starbucks and a Whole Foods.¹⁵⁷ The threat of redevelopment and displacement featured so consistently in plays meant to chronicle Black life illustrates the racialized nature of property ownership. The ubiquitous presence of urban renewal—which today is termed economic development—means that property ownership in areas with *race and class transformation* potential comes with an inherent limitation—residency is contingent and subject to revocation. Thus, the second reality of subordination in redevelopment is that the places where redevelopment occurs are often subordinating.¹⁵⁸

The measure of state and local government efficacy has long been its ability to facilitate economic development.¹⁵⁹ What has changed, however, is that globalization is rewriting the face of the city. Because the local economic development project currently transpires in cities throughout the United States,

153. See Jackson R. Bryer & Mary C. Hartig, *Introduction* to CONVERSATIONS WITH AUGUST WILSON, at vii, xiv (Jackson R. Bryer & Mary C. Hartig eds., 2006).

154. *Id.* at xi.

155. *Id.* at vii-xvi.

156. See generally Sandra G. Shannon, *August Wilson Explains His Dramatic Vision: An Interview*, in CONVERSATIONS WITH AUGUST WILSON 118, 145-46 (Jackson R. Bryer & Mary C. Hartig eds., 2006).

157. AUGUST WILSON, *RADIO GOLF* 9, 25, 48 (2007).

158. For an excellent, detailed account of how redevelopment affected a Black community in Cocoa, Florida, see generally Judith E. Koons, *Fair Housing and Community Empowerment: Where the Roof Meets Redemption*, 4 GEO. J. ON FIGHTING POVERTY 75 (1996).

159. See Audrey G. McFarlane, *Local Economic Development Incentives in an Era of Globalization: The Exploitation of Decentralization and Mobility*, 35 URB. LAW. 305, 309 (2003).

local economic development within the context of globalization has become increasingly desperate.¹⁶⁰ Local economies are being driven by national and global economic imperatives:

This process of transnational market expansion and integration is manifested in a range of phenomena: a new international division of labor, the global spread of financial markets, an interpenetration of industries across borders, the spatial reorganization of production, a temporal acceleration in economic activity, vast movements of population, a diffusion of consumer goods, and a welter of transnational cultural linkages. Taken together, these serve to significantly alter the nature of places, the relations of power, and the lived experiences of peoples in most part of the globe.¹⁶¹

Though globalization is not a fixed phenomenon and not all agree on its contours, causes, benefits, or detriments, it is still much like global warming: people generally recognize its presence.¹⁶² According to David Harvey, globalization is the “freer circulation of money, commodities and people (and hence capital) throughout the spaces of the city.”¹⁶³ Most significant is the shift in the urban economy from production-oriented development to consumption. The chief product of local economies shifts from work to leisure, and both local government policy and market preference converge in a dramatic urban spatial restructuring. The primary mechanism for local economic vitality is “attraction of the affluent” through tourism, development of upscale residential and commercial amenities, high-tech service industries, and institutions of higher education.

According to Rachel Weber, states make the built environment more flexible and responsive to the investment criteria of real estate capital through spatial policies such as urban renewal.¹⁶⁴ A broad interpretation of eminent domain

160. Asmara Tekle Johnson, *Correcting for Kelo: Social Capital Impact Assessments and the Re-balancing of Power between “Desperate” Cities, Corporate Interests, and the Average Joe*, 16 CORNELL J. L. & PUB. POL’Y 187, 210-29 (2006) (discussing domination of corporations over city decisions).

161. See Sites, *supra* note 7, at 123.

162. Saskia Sassen’s work in *The Global City* posited that certain world cities were centers of global finance and production operations such that they were global cities in population, priorities, and economic importance. Sassen’s insights can be broadened beyond these technopoles of world capital to every city in America and across the globe because the global economy has permeated localities everywhere. See generally SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (2d ed. 2001); e.g., Brian J. Godfrey, *Urban Development and Redevelopment in San Francisco*, 87 GEOGRAPHICAL REV. 309, 322 (1997) (expanding the global city hypothesis to a second tier of world cities like San Francisco).

163. David Harvey, *The Political Economy of Public Space*, in *THE POLITICS OF PUBLIC SPACE* 25 (Setha Low & Neil Smith eds., 2006).

164. Neil Brenner & Nik Theodore, *Cities and Geographies of “Actually Existing NeoLiberalism,”* in *SPACES OF NEOLIBERALISM* 4 (Neil Brenner & Nik Theodore eds., 2002).

doctrine, therefore, accommodates global capital, which seeks flexibility and change through creative destruction. Because global capital seeks sites of lucrative investment, distant investors in REITs control or influence our local spatial conflicts and policies.¹⁶⁵ Urban spatial restructuring and redevelopment presents particular issues of land access and land tenure rights for low- and moderate-income groups. The site of investment needs to rise in value, and property markets with economic value depressed by racialized geography will be particularly attractive for investment.¹⁶⁶ Working-class communities will always be more subject to redevelopment so property ownership in undervalued or centrally located urban areas is a more tenuous form of land tenure. Because market forces and government are symbiotically intertwined in the eminent domain process, the most compelling property rights and personhood aspect of the eminent domain debate is the reality that no justification can erase the impact of losing one's home and its deeply associated sense of personal autonomy, history, and community.¹⁶⁷

One reason that discussing eminent domain doctrine remains relevant,

(arguing that redevelopment is contextual, depending on "the legacies of inherited institutional frameworks, policy regimes, regulatory practices and political struggles").

165. Weber, *supra* note 102, at 186; see generally Jack H. McCall, *A Primer on Real Estate Trusts: The Legal Basics of REITs*, 2 TRANSACTIONS: TENN. J. BUS. L. 1 (2001).

166. I expand on this point in McFarlane, *The New Inner City*, *supra* note 101, at 17-21; see also Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 VILL. L. REV. 1037, 1039 (2000) ("[R]acial spaces are visible artifacts of both racial segregation and the relations of investment, production and exchange . . . within racially subordinated communities.").

167. There can be a plus side to the subordination of the location of redevelopment because one person's subordination is, of course, another person's advantage. In this case, the sweetener of the redevelopment's changes are the promise and reality of short-term construction jobs or service jobs. That these jobs are often low wage or without benefits is a problem, but many say some jobs are better than no jobs. In fact, some argue that one should bow to the inevitability of redevelopment and adapt by seeking to benefit from it. For example, the Atlantic Yards Project is anticipated to:

[B]ring an estimated 10,000 permanent and 15,000 construction jobs, contracting opportunities for minority- and women-owned business, and billions of dollars in net benefits, including \$2.8 billion in new net tax revenue to New York City and New York State over 30 years. It will make a real difference for a city where 48.3% of African-American males are unemployed or out of the workforce entirely, more than 1 in 5 households pay half their income on rent, and fiscal problems continue to force cuts in important services.

Brief for Brooklyn United for Innovate Local Development (BUILD) et al. as Amici Curiae Supporting Respondents, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 154143, at *3. See Confessore, *supra* note 105 (demonstrating that color lines have blurred in support and opposition of the project with Black working-class people possibly being more in support of the project rather than against because of jobs. On the other hand, one black proponent concedes the project is "instant gentrification").

despite the recent flurry of state legislation purporting to restrict eminent domain for economic development, is that these reform efforts have left the blight exception intact.¹⁶⁸ The assumption is eminent domain should not be used for economic development, but only for public infrastructure or “blighted” properties. Given the difficulty of determining what blight is (one person’s blight is another person’s community), the ease of accepting blight elimination as a basis for exercising eminent domain is, in effect, a way of saying “[t]ake someone else’s property, not mine.” Does living in a blighted neighborhood mean one’s property is any less important to the owners who consider that blighted place home?¹⁶⁹ What do the ‘hood, a highway, and a city park have in common? They are the quintessential types of public works projects that satisfy the popular conception of the proper exercise of eminent domain. Public ownership or public use of a highway or road does not eliminate potential subordination if most highways are directed through one’s neighborhood. The other end of the urban renewal equation for Black communities and the devastation they suffered during that era was the federal highway program. Funds from that program were used to build highways directly through Black neighborhoods, eliminating vibrant and thriving residential neighborhoods and commercial districts. While the highways were public, their selected location devastated specific people and places.¹⁷⁰

4. *Subordination in the Method of Redevelopment.*—The most subordinating aspects of redevelopment are probably the methods of development decisionmaking. Redevelopment consists of a set of social and decisionmaking practices, born both of custom and of economic necessity that favor privatized decisionmaking. Redevelopment is a process heavily dominated by national real

168. See Dana, *supra* note 15, at 374-78; David A. Dana, *Why the Blight Distinction in Post-Kelo Reform Does Matter*, 102 NW. U. L. REV. COLLOQUY 30, 30-31 (2007) (discussing how few states have banned the blight exception).

169. See Bruce Fein, *Eminent Domain, Eminent Nonsense*, WASH. TIMES, Oct. 12, 2004, at A16 (describing the Fort Trumbull project as a “middle-class re-enactment of *Berman*” and criticizing Petitioners’ effort “to make the Constitution pivot on Marxist-like class distinctions” by limiting condemnation for redevelopment to blighted land); see also Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URB. L.J. 657, 686 n.178 (2007) (“Indeed, many of the cases in which landowners have prevailed in state courts involve urban revitalization projects that encompass middle-class landowners.”); Dana, *supra* note 15, at 366 (“Kelo-inspired reform movement privileges condemnations for blight removal and . . . the stability of middle-class households. . . .”); Amanda W. Goodin, Note, *Rejecting the Return to Blight in Post-Kelo State Legislation*, 82 N.Y.U. L. REV. 177, 178-79 (2007); see, e.g., *City of Norwood v. Horney*, 853 N.E.2d 1115, 1144 (Ohio 2006); *County of Wayne v. Hathcock*, 684 N.W.2d 765, 769 (Mich. 2004).

170. See *Tullock v. State Highway Comm’n*, 507 F.2d 712, 714 n.1 (8th Cir. 1974) (“The impact of federally-assisted urban renewal and highway construction projects cannot be overestimated. More than two million dwelling units were demolished by such projects in the years between 1950-68 according to one study by the National Association of Home Builders, and some 62,000 families and individuals were displaced by federal highway programs in 1970 alone.”).

estate investment interests, practices, and conceptions.¹⁷¹ Although issues arise because of genuine conflicts or disagreements over development, for which there may be no constitutional prescription (it depends on politics), the main reason courts are asked to intervene in eminent domain exercises is a political process failure concerning redevelopment. The political process failure occurs because the economic development process is highly privatized. Additionally, cities are not merely welcoming to business but are using their governmental powers as proprietors in what is known as the “public-private” partnership.¹⁷² As Marc Mihaly argues, public and private roles have been reordered in the public-private partnership in order to allocate risk and reward consistent with market conditions and requirements.¹⁷³ The public-private partnership has become entrenched in the way cities think and act.¹⁷⁴ As a consequence, the public role of local government in development is now linked with private goals and perspectives. Thus, the public’s emphases fall necessarily on commercial success. Not only does the City establish quasi-private entities to oversee development, but the city itself is being carved up into private enclaves, both in terms of property ownership as well as financing and governance. Most Cities have authorized private business districts to manage these neighborhoods.¹⁷⁵ Financing techniques such as tax increment financing often leverage future tax revenues arising from the new developments. Most, if not all, of the increased taxes are paid to repay the district’s debt.¹⁷⁶

Second, opportunities for influencing economic development decisionmaking are limited because of the privatized decision-making process and the nature of informal communications and relationships between corporations, developers, Cities, and quasi-private development agencies. The economic development decision-making process is further privatized because it is run by quasi-public authorities immune from popular accountability.¹⁷⁷ Privatization of public

171. See *supra* Part I.D.2-3.

172. See SUSAN S. FAINSTEIN, *THE CITY BUILDERS: PROPERTY DEVELOPMENT IN NEW YORK AND LONDON, 1980-2000*, at 136-37 (2d ed. 2001) (discussing the lessons learned from publicity-initiated private redevelopment projects in Kings Cross and Times Square); see also David L.A. Gordon, *Review of Fairstein*, June 2002, <http://www.h-net.org/reviews/showrev.php?id=6384>.

173. See Mark B. Mihaly, *Public-Private Redevelopment Partnerships and the Supreme Court: Kelo v. City of New London*, 7 VT. J. ENVTL. L. 41, 41-42 (2005), available at <http://www.vjel.org/journal.php?vol=2005-2006>.

174. For further development of this point, see Audrey McFarlane, *Putting the “Public” Back into Public-Private Partnerships for Economic Development*, 30 W. NEW ENG. L. REV. 39, 41 (2007).

175. See Audrey G. McFarlane *Preserving Community in the City: Special Improvement Districts and the Privatization of Urban Racialized Space*, 4 STAN. AGORA 5, at *1 (Fall 2003), available at <http://agora.stanford.edu/agora/volume4/mcfarlane.shtml>.

176. See George Lefcoe, *Finding the Blight that’s Right for California Redevelopment Law*, 52 HASTINGS L.J. 991, 995-97 (2001).

177. See Peter W. Salsich, Jr., *Privatization and Democratization—Reflections on the Power of Eminent Domain*, 50 ST. LOUIS U. L.J. 751, 755 (2006).

decisionmaking presents a democratic political process failure. Implicit in this argument is the understanding that in the political process of development, the lower classes and the politically unconnected lose out in a process that is informal, privatized, and shielded in large part from public scrutiny.

Third, strategic considerations can influence the application and waiver of regulatory power through the informal relationship between city administrators, developers, and any commercial entity wishing to locate in the city.¹⁷⁸ Regulatory waivers, infrastructure write-downs, and public financing are the norm. The public-private distinction continues on its undefined path. Cities act like merchants or proprietors when they pursue an explicit affluent class attraction policy and use incentives to lure and retain them.¹⁷⁹ Charles Tiebout's idealized vision of local governments as proprietary entities seeking to attract an optimal number of city residents (the "consumer-voters") has come to fruition. The problem with Tiebout's "model" is the reality that not everyone fulfills Tiebout's idealized assumptions that are fundamental to making his model work. Most people do not live on investment income, enjoy perfect employment opportunities, or even have the realistic ability of escaping violent impoverished neighborhoods. The result of both Tiebout's thesis and the reality of local government today is an alarming slant in local government policy towards the needs of those with wealth.

Additionally, the City's proprietor-like acts may relate to the class identity of the elite decisionmakers who dominate development decisionmaking. The existence of these networks suggests that part of the reason for economic development's popularity as a local government project is not only the desire to promote the economic growth of the municipality; it may also be attributable to the desire to get along with one's elite peers.¹⁸⁰ An alternate explanation is that the networks exist because private business has a way of legitimizing public government. This is confirmed by the prevalence of informal relationships and communications between corporations, developers, Cities, and quasi-private development agencies as the operative mode of conducting city life.¹⁸¹ Deal-making and public subsidy of infrastructure costs and coverage of site acquisition expenses are a part of this process. Redevelopment is characterized by formal deal-making that is preceded and shaped by informal relationships and behind-the-scenes communication and agreements. These deals are run through public approval processes only when absolutely necessary. By the time the deal reaches the public process, the parameters are set and the nature of the development is no

178. A pro-economic development discourse also makes economic development seem inevitable and beneficial. See David Wilson, *Metaphors, Growth Coalition Discourses and Black Poverty Neighborhoods in a U.S. City*, 28 *ANTIPODE* 72, 73 (1996) (analyzing the metaphors used in "growth" discourse in urban development).

179. See McFarlane, *The New Inner City*, *supra* note 101, at 21-22.

180. Or, at the very least, one's class position must undeniably influence one's perspective about what is desirable development.

181. See generally BERNARD J. FRIEDEN & LYNNE B. SAGALYN, *DOWNTOWN, INC. HOW AMERICA REBUILDS CITIES* 17 (1989) (describing these relationships in the mid-twentieth century).

longer subject to question or significant modification.¹⁸² Thus, anyone inclined to oppose such deals is forced into an all-or-nothing situation: take it or leave it.¹⁸³

Fourth, development must happen quickly to be cost-effective. Politics are incremental. Thus far, these disagreements over development have been ignored in both the blight and the economic development context. Under the current regime, the effect of the broad interpretation of public purpose is that city property owners are left to the political process. Further indication of political process failure is that individual property owners become the inadvertent champions for their communities by opposing the taking of their individual parcels. But their opposition is almost too little, too late. They should have been involved in the formulation of the plan. Opposition to the plan typically proves ineffective in the long term and victories usually only slow down the process. The individual property owner against the government requires organizing and activism to combat governmental decisionmaking. Even if one fights, displacement may not be averted and the ability to return is not guaranteed.

In light of the nearly unlimited discretion afforded to states and local governments in the use of eminent domain power, the real controversy is fueled by the propriety of the underlying development plan—or to use the Court's language, the carefully considered development plan.¹⁸⁴ The institutional norms and structures of redevelopment sound very good on paper. The public entity, the City, is authorized by the State to control the use of land. The planning process seeks public input. The government enters into agreements with developers to achieve jointly what either could not achieve on its own because it is nearly impossible to cost-effectively assemble parcels for redevelopment independently. The government does not bring the organizational structure, know-how, or finances to carry out projects alone. Often, the anticipated market barriers of assembly problems suggest that a deal will not be touched. The lack of public accountability in economic development decisionmaking then raises questions about how those plans are put together and whether a plan adequately accounts for all relevant dimensions of the public interest. The lack of public accountability also raises issues of public resource allocation towards large private enterprises.¹⁸⁵ Many people have common-sense impressions that Cities

182. See Patience A. Crowder, "Ain't No Sunshine": Examining Informality and State Open Meeting Acts as the Anti-Public Norm in Inner-City Redevelopment Deal Making, 74 TENN. L. REV. 623, 638 (2007).

183. See, e.g., David Nakamura, *Council Approves Altered Stadium Deal; Requirement for 50% Private Financing Leaves Team's D.C. Future in Question*, WASH. POST, Dec. 15, 2004, at A01; David Nakamura & Thomas Heath, *Baseball Rejects Council's Changes in Financing Plan for D.C. Stadium*, WASH. POST, Dec. 16, 2004, at A01; see also GREGORY J. CROWLEY, *THE POLITICS OF PLACE: CONTENTIOUS URBAN REDEVELOPMENT IN PITTSBURGH*, 145-46 (2005) (case studies suggesting that city leaders strategically release information as late as possible to forestall opposition).

184. *Kelo v. City of New London*, 545 U.S. 469, 478 (2005).

185. See Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints*

are beholden to big corporations and developers and are engaged in naked land-grabs to redevelop property to more lucrative tax-receivable, luxury-related land uses like condos and upscale retail and entertainment complexes.

The eminent domain controversy focuses on taking property from private parties and transferring it to developers, i.e., other private persons, to put the property to another use consistent with the town's revitalization plans. It seems a violation of all principles of property ownership to allow government to terminate one's property rights for the benefit of another. Yet, would government-run reconstruction projects produce a better outcome? The public-private distinction is not helpful in resolving the eminent domain/redevelopment dilemma. From an anti-subordination standpoint, redevelopment is not "okay" by virtue of any particular legislative classification.¹⁸⁶ Instead, subordination arises from the systematic impact of executing particular governmental acts. In *Village of Willowbrook v. Olech*, for example, the Supreme Court allowed a single homeowner to bring an equal protection claim based on unequal treatment in the execution of governmental regulations.¹⁸⁷ If a single act by government can be the basis for an equal protection claim, then the cumulative effects of similar redevelopment decisions by different local governments should seem a justifiable basis for an inquiry into the use of eminent domain and the nature of government support for redevelopment.

The reliance on a carefully considered plan leaves room for a form of municipal corruption which is the giving in to the taste of the affluent and reinforcing the disadvantage of not being upscale. If private companies want the benefit of public powers for redevelopment, then their developments should necessarily reflect the population in terms of residential and commercial amenities. The issue is the forces of capital, the intersection of race, class, and geography, and the fight for the social status of the city.¹⁸⁸ This aspect of

on *State Tax Incentives for Business*, 110 HARV. L. REV. 377, 393 (1996) (discussing the pressure to engage in economic development through business incentive competition). *But see* *Daimler-Chrysler Corp. v. Cuno*, 547 U.S. 332, 343 (2006) (state and city taxpayers Commerce Clause challenge to massive business tax incentives rejected for lack of standing under Article III of U.S. Constitution).

186. Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343 (1949) (in most contexts, the basic role of the Equal Protection Clause is to act as a limit on government classifications); *see, e.g.*, *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) ("The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.").

187. *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam) (finding no cause of action because the practical result will probably be the proliferation in the federal district courts of cases where an individual person claims that governmental officials have treated him or her unequally).

188. *See* Elizabeth M. Iglesias, *Global Markets, Racial Spaces and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 VILL. L. REV. 1037, 1048 (2000) ("[T]he struggle against subordination must be understood as a struggle for power within the institutional arrangements through which power is legally organized

Fourteenth Amendment jurisprudence has been an explicit project of the study of regulatory takings.¹⁸⁹ Regulatory takings is also an anti-subordination doctrine, albeit not to avoid stigma, but to preserve the privileges and privileged status of property owners.¹⁹⁰ In the regulatory takings context anti-subordination addresses the limits of the local democratic process by acknowledging that small groups of property owners will rarely have the political will or power to realistically challenge local government decisionmaking that limits their use of their property. Thus, the government's actions are considered tantamount to taking their property.¹⁹¹

II. DEVELOPMENT DISAGREEMENTS IN THE SUBURBS

A. *The Struggle over the Right to Development*

Economic development is by no means limited to urban settings. In the older, declining suburbs, local government councils resort to economic development techniques previously found only in the cities.¹⁹² In the newer, ever-expanding suburbs, the major issue is not only development but too much development.¹⁹³ Rural space is being paved over for new homes, commercial office parks, and retail projects.¹⁹⁴ State and local government efforts focus primarily on seeking to ameliorate the impact of development on open space, delicate ecosystems, and disappearing rural land. They seek to regulate, balance, or halt the development process.¹⁹⁵ Governmental efforts to restrict development

and deployed. This in turn means that the anti-subordination objectives at the heart of CRT depend on reorganizing these institutional structures [and] reforming the legal doctrines that construct them.”).

189. *But see* James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211, 211-12 (1993) (arguing the Court has fled from substance and accusations of “Lochnering”).

190. *See* discussion *infra* Part III.

191. As John Calmore argues, “the oppressed must use rights as attention grabbers and wedges In the context of collective conflict, the assertion of rights must be seen as claims to power, privileges, and resources.” John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2214 (1992).

192. *See, e.g.,* *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004) (discussing the county’s attempt to capitalize on its airport and follow the new *aerotropolis* approach to economic development by making transportation the hub of development).

193. *See* JOEL GARREAU, *EDGE CITY: LIFE ON THE NEW FRONTIER* 12 (1991) (“Nowhere in the American national character, as it turns out, is there as deep a divide as that between our reverence for ‘unspoiled’ nature and our enduring devotion to ‘progress.’”).

194. *See generally* Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 137 (1999).

195. *See, e.g.,* Capacity analysis plus exactions statute—FLA. STAT. ANN. § 163.3180 (West 2006 & Supp. 2009) (enabling local governments to measure the adequacy of public facilities and restrict development that would exceed predicted levels of service, with exceptions for urban

have been controversial because they interfere with the development or investment expectations of property owners. A number of regulatory takings challenges centering around property owners rights to develop their properties have been decided by the U.S. Supreme Court, most recently in the *Tahoe-Sierra*¹⁹⁶ and *Lingle v. Chevron*¹⁹⁷ decisions.¹⁹⁸ In comparison with the level of loss and disruption seen in the eminent domain context, the regulatory takings stories are less dramatic, less disruptive, and arguably less compelling. Yet the response and opposition to government regulation have been no less angry or spirited. At the heart of the regulatory takings decisions is a fundamental disagreement over interfering with development, and a heartfelt belief that property ownership includes a right to development.

The Supreme Court's fact-specific regulatory takings doctrine has shifted back and forth in its responsiveness to property owners seeking the right to resist governmental regulation and develop their properties. Overall, however, the doctrine has been more responsive to property owners seeking the right to resist redevelopment and retain ownership of their properties. Although the doctrine has evolved imperfectly, its intention to solidify property-based boundaries against the intrusion of government decisionmaking has very clearly signaled to local governments that they should tread carefully when individual interests are in conflict with public need.

Accordingly, the evolution of regulatory takings jurisprudence lays out one of the most consistent anti-subordination doctrines in modern law. Although the analysis is framed in terms of individual harm to individually held property rights, the Court's willingness to intervene on behalf of citizens in situations of great public need (i.e., environmental preservation¹⁹⁹) or to intervene where the personal harm is rather minimal and the matter is one of principle (e.g. the

development or payments for improvements by developers); MD. CODE ANN., AGRIC. §§ 2-501 to -518 (West 2002 & Supp. 2008) (establishing the Maryland Agriculture Land Preservation Foundation with the power to create agricultural preservation areas and purchase agricultural land preservation easements); Urban Growth boundary—OR. REV. STAT. § 197.296 (West 2003 & Supp. 2008) (establishing factors to measure the sufficiency of buildable lands within an urban growth boundary that is created based on residential distribution); Growth moratorium ordinance—Union County, N.C., Amendment to the Union County Land Use Ordinance Establishing a 12-Month Moratorium on Major Residential Development (Aug. 15, 2005, Extended July 25, 2006), *available at* http://www.co.union.nc.us/Portals/0/Planning/Agenda_Min/2006/PB_min06-20-06.pdf (establishing a twelve-month moratorium on residential development over five dwelling units while the county creates an Adequate Public Facilities ordinance); Coastal protection—SANTA BARBARA COUNTY, CAL., COASTAL ZONING ORDINANCE, ch. 35, art. II, § 35-50 (2004) (protecting, among other things, public access and quality of the environment through prohibition of dry sand development, easements between road and wet sand, and set-backs for bluff developments), *available at* <http://www.sbcountyplanning.org/PDF/A/Article%20II.pdf>.

196. *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

197. *Lingle v. Chevron U.S.A.*, 544 U.S. 528 (2005).

198. *See id.* at 531; *Tahoe-Sierra*, 535 U.S. at 306.

199. *See, e.g., Tahoe-Sierra*, 535 U.S. at 306.

principle of the right to exclude has been abrogated in a way that the Court finds objectionable²⁰⁰) provides a striking contrast to the eminent domain redevelopment cases. The Court is most interested not in the individual rights of the parties before the Court, but more generally in protecting property owners as a group from the public enterprise of government and the public needs of the general welfare.

In particular, the doctrine of regulatory takings evolution reflects an imperfect, yet effective attempt to insulate private property owners from the structural inequities of the political process. In this process, the harms to a few or to consistently disadvantaged groups (in relation to the ability to affect governmental decisionmaking) suggest a structural disadvantaging of property rights in the face of increasingly complex and demanding public needs. Because the doctrine's evolution involved an attempt, albeit largely unsuccessful, to harden property rights protections by intervening to protect property owners based not on the extent of impact but on principle, the evolution of the regulatory takings doctrine suggests that regulatory takings is an anti-subordination doctrine. By creating a bulwark against the demands of public need, the doctrine implicitly supports individualism and withdrawal into private enclaves; it also activates the agency of suburban property owners by giving them a right to resist governmental decisionmaking.²⁰¹

The governmental projects of city and suburb are not unrelated. Fostering development in one setting and attempting to regulate, if not halt, development in another, takes place against a backdrop of each type of geographic area battling to obtain, retain, or manage middle-class residents.²⁰² Both city and suburb, to the extent this binary distinction retains salience, are engaged in a battle for identity to ensure that they will both capture the middle- and upper-middle class resident as well as establish themselves as the type of geographic area most associated with the social status, privilege, and power of affluent individuals.²⁰³ The geography of city and suburb is closely associated with

200. See, e.g., *Lingle*, 544 U.S. at 531.

201. The exclusionary zoning issue is based on this quest for some approximation of upper middle-class status. Zoning for the tax rate necessarily sets a premium on higher end incomes and residents. To the extent that race is associated with lower incomes in people's minds, the racial component of upper-middle-class identity is clear (regardless of the reality). See J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 *FORDHAM URB. L. J.* 527, 528 (2007); Lee Anne Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* 163, 172-77, 186-89 (William A. Fischel ed., 2006) (exploring motives for exclusion).

202. See Maureen Kennedy & Paul Leonard, *DEALING WITH NEIGHBORHOOD CHANGE: A PRIMER ON GENTRIFICATION AND POLICY CHOICES* 1 (2001), available at <http://www.brookings.edu/reports/2001/04metropolitanPolicy.aspx> (“[A] new corps of mayors has made attracting middle- and upper-income residents back to their cities a leading priority, to revitalize the tax base of their communities, the visibility of their neighborhoods and the vibrancy of their downtowns.”).

203. See J. ERIC OLIVER, *DEMOCRACY IN SUBURBIA* 5 (2001) (arguing that suburbanization

maintaining an identity with particular spatial histories and configurations of property ownership or lack of ownership.²⁰⁴ Therefore, economic development, which is often predicated on attracting middle-class and affluent individuals by building or providing residential, commercial, and retail amenities that satisfy their consumption tastes, is in fact a battle to create a new identity for the city.

Thus, battles in the suburban context over land use related to a notion of identity in the background of the struggle to retain the right to develop. For example, fee simple absolute bestows the ultimate in legal rights and protections against the encroachment of outsiders—people, the economy, and government. This property right helps to formulate and reflect one's identity. One's identity comes with an associated level of agency—that is, the ability to exercise free will with regard to decisions and actions. Therefore, identity and agency are two components of property—what one expects to receive by owning property. Both concepts are constitutive of one another as well as a means of achieving the other. Property ownership is ultimately intended to endow individuals with a certain amount of agency to exercise the “sticks” in the bundle of property rights—the right to use and enjoy, transfer, exclude; the right to be immune from expropriation or damage, the right to devise, and so on. Therefore, property doctrine conceives of denial of property rights as a denial of individual agency. Although this is recognized implicitly, it is important for understanding that regulatory takings doctrine requires an adequate consideration of these different dimensions of property ownership to create consistent doctrines to handle property ownership and residency across varying geographies.

The fundamental ordering principle of regulatory takings doctrine is that sometimes regulation just “goes too far.”²⁰⁵ This statement, made at the dawn of the judicial willingness to acknowledge and provide a remedy for the impacts of regulation on property owner agency, captures the essence of regulatory takings doctrine. The jurisprudence associated with the doctrine is a complex, highly contextual attempt to limit governmental regulation through an ad hoc fact-based process, from which is distilled the refuge that property ownership provides to citizens. Justice Holmes's famous statement reflects both an increasing sophistication in conceptualizing property rights and an evolution in thinking about such rights against the government's prerogative to protect the general welfare. The statement represents a shift from willful blindness of the impacts on citizens to an attempt to mediate between government and citizen. It turns on judicial gut-felt principles of fundamental fairness couched in the language of property rights.

Regulatory takings doctrine represents a slow evolution in the idea of

displaces social conflicts between citizens based on race and class into social conflicts between political institutions).

204. It is not hard to picture geography and come up with an identity for the area—an economic class that will be associated with a particular racial identity. Although race does not always track class, more often than not, it does. See generally Lee Anne Fennell, *Properties of Concentration*, 73 U. CHI. L. REV. 1227 (2006).

205. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

acknowledging different impacts of the government on citizens. If a citizen can point to a significant-enough impairment of a property that decreases the economic value of the property enough to be considered harmful, then it will be considered a taking. In one historical sense, this tracks a similar evolution in eminent domain law. At one time in some jurisdictions, the government merely took property and rarely, if ever, paid compensation.²⁰⁶ This was upheld by the courts in part because of a judicial unwillingness to acknowledge the impacts on property owners for fear of interrupting the governmental project. It was also rationalized under the rubric of just compensation, which was considered a matter of opinion. This willful blindness gradually ended and eminent domain law and the regulatory takings concept evolved in tandem. First, eminent domain law acknowledged different kinds of actual seizures that require compensation. This led to acknowledging physical occupations directly connected to government activity that severely harmed landowners under the rationale of inverse condemnation. For example, flooding²⁰⁷ and blasting condemnation were recognized as unintentional indirect exercises of eminent domain accomplished through an affirmative government act. This idea was extended to include planes flying overhead as a significant-enough taking tantamount to physical occupation.²⁰⁸ At this point, regulatory takings concepts and eminent domain law diverged. Eminent domain doctrine remained steady for nearly fifty years with the Supreme Court adopting a deferential attitude towards the local government's exercise of eminent domain power. In contrast, regulatory takings doctrine reflects a less generous attitude towards the local government exercise of police power to manage the ill effects of development.

*B. Is There a Right to Development? Tracing the Court's Response
to the Claim of the Right to Development*

The recent evolution in regulatory takings doctrine is difficult to characterize because each Supreme Court decision has seemed to signal a new direction. However, some general contextual observations are relevant. First, the suburbs rose and were created partly in response to the negatives of the city. Suburbs were a refuge from the city's crowded conditions and a sanctuary from the large bureaucracies controlled by ethnic immigrants and mob bosses. They were created in a quest for local control, for exclusion, and for the right to escape from all of the city's disadvantages. This quest to escape from disadvantage is an

206. See generally Arthur McEvoy, *Markets and Ethics in U.S. Property Law*, in *WHO OWNS AMERICA?: SOCIAL CONFLICT OVER PROPERTY RIGHTS* 94 (Harvey M. Jacobs ed., 1998) (brief historical description of early eminent domain law).

207. *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177 (1871) (extreme form of physical intrusion is always a taking such as when a dam floods neighboring property).

208. *United States v. Causby*, 328 U.S. 256, 267 (1946) (regular flights overhead by military aircraft held a taking); see also *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979) (navigational servitude on pond housing private marina that involved actual physical invasion held a regulatory taking).

important dimension of the geographical context of regulatory takings decisions. Many regulatory takings cases reflect heightened privatized sensibilities about property rights, privilege, and affluence: the suburbs are designed for the affluent, who are usually able to buy their way out of urban disadvantages, social disorder, and redistribution imperatives from the heterogeneous society.

Second, the regulatory takings cases reflect a struggle over whether development is a stick in the bundle of property rights. The underlying common claim has tended to center around a property owner's quest to develop his or her property. The regulatory takings cases illustrate a background debate in property law about whether the bundle of property rights includes "the right to develop."

Some commentators are unequivocal in their conviction that there is a right to develop. In *Penn Central Transportation Co. v. City of New York*,²⁰⁹ the notion of a right to develop was rejected in favor of the concept of regulatory takings as protecting only "investment-backed" expectations of such magnitude that they outweighed the reasonableness of public regulation.²¹⁰ Assertions of a right to development are implicit in most of the major Supreme Court regulatory takings decisions. Regulatory takings claims assert that the right to develop is an inviolable stick in the bundle of property rights. Regulatory takings doctrine has shown an indirect solicitousness of this desire to develop, which is consistent with a common law tradition that the right to develop is highly prized in American law.²¹¹

Notwithstanding the acceptance of most, if not all, principles of English common law into the property doctrine of the United States, most states rejected English notions that did not fit with the new and developing character of the country.²¹² In *Prah v. Maretti*,²¹³ the Wisconsin Supreme Court explained that

209. 438 U.S. 104 (1978).

210. See Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1233-34 (1967) (citing *Penn Cent. Transp. Co.*, 438 U.S. at 104); see also *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (opining that the Court's "'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property"); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979) (using the term "reasonable investment backed expectations"); Daniel R. Mandelker, *Investment-Backed Expectations: Is There a Taking?*, 31 WASH. U. J. URB. & CONTEMP. L. 3, 5-6 (1987) (questioning *Penn Central*'s omission of the estoppel or vested rights doctrine as a natural limit to the extent of valid investment-backed expectations. Without these existing doctrinal limits, "the expectations taking factor introduces a landowner tilt to taking theory that did not exist before").

211. McEvoy, *supra* note 206, at 94 ("The law of property in the United States contains a profound bias toward developmental uses and against such nonmarket values as the health and welfare of communities that live on the land or, indeed, the ecological well-being of the land itself.").

212. See, e.g., *Dillman v. Hoffman*, 38 Wis. 559, 574 (1875) ("In new states like this, the uses of land and of structures on land are more variable with the growth of population and business, than in England or the older states; and it might tend to impede sale and improvement of real property,

the common law rejection of a right to sunlight reflected the fact that the nineteenth and twentieth centuries were a period of growth when change was expected.²¹⁴

As the city grows, large grounds appurtenant to residences must be cut up to supply more residences The cistern, the outhouse, the cesspool, and the private drain must disappear in deference to the public waterworks and sewer; the terrace and the garden, to the need for more complete occupancy Strict limitation [on the recognition of easements of light and air over adjacent premises is] in accord with the popular conception upon which real estate has been and is daily being conveyed in Wisconsin and to be essential to easy and rapid development at least of our municipalities.²¹⁵

Direct restraints on alienation have also been disfavored by the courts for development reasons:

Another evil growing out of a restraint is its effect to discourage improvements when it is imposed upon an interest in land. A landowner will be reluctant to make improvements upon land that he cannot sell during the period of restraint, which may be a long term of years, or even his whole life. In many instances, therefore, the restraint deters the owner of land from obtaining the maximum enjoyment of it; it may also retard the development of a particular section of the community If a substantial portion of our land were subject to restraints upon alienation, the resultant effect upon social and economic life would be serious.²¹⁶

Laws designed to restrict development merely to preserve open land, natural resources or wildlife are a significant departure from, if not a repudiation of, the orientation of American property law.²¹⁷ A good portion of regulatory takings

if old uses of soil or buildings should be too easily placed beyond the power of owners by easements implied by conveyances in their chains of title.”); *see also* *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five*, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959) (allowing a hotel tower to block the pool and beach of neighboring hotel, rejecting an easement for light and air on the rationale that the English doctrine of ancient lights was rejected in the United States).

213. 321 N.W.2d 182 (Wis. 1982).

214. *See, e.g., id.* at 236.

215. *See id.* at 189 (quoting *Miller v. Hoeschler*, 105 N.W. 790, 791 (Wis. 1905)); *see also* *Depner v. U.S. Nat’l Bank*, 232 N.W. 851, 852 (Wis. 1930). The nuisance cases further illustrate the law’s common pronouncements on development; the way in which the doctrine has been defined and applied has encouraged unimpeded development. *See Hadacheck v. Sebastian*, 239 U.S. 394, 404 (1915); *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 706 (Ariz. 1972); *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970).

216. *White v. White*, 251 A.2d 470, 473-74 (N.J. Super. Ct. Ch. Div. 1969) (quoting 6 AMERICAN LAW OF PROPERTY § 26.3, at 413-14).

217. *McEvoy, supra* note 206, at 101-02. (Early “traditional common-law restrictions on

doctrine represents an attempt to maintain consistency with the past or traditional presumptions in favor of development.²¹⁸ The claim that the government has no right to bother someone on his or her property only works with the implicit rural assumption that what one does on private land does not affect others. As the nation has developed, it has become more difficult for a property owner to argue that what one does on his or her own property does not affect others in terms of open land availability or unique types of property. Therefore, the presumption towards development is no longer as universally beneficial or a matter of life and death it once was. Similarly, the claim that one can hide on his or her land and do anything one wants is not true. Thus, property is not immune from societal interests.

The third general observation is that the ad hoc, factually based analysis of the competing interests of property owner and government has resulted in a doctrinally complex shifting back-and-forth in case outcomes. Although volumes have been written about the imperfections and contradictions in the rules announced in these cases, anyone who steps back and looks at the cases will see a relatively consistent evolution of regulatory takings reasoning since 1987. That evolution reveals the Supreme Court's emphasis on an additional analytical construct focusing on whether an aspect or dimension of property rights has been impaired.²¹⁹ This conceptual severance approach is further divided in two. The first is the categorical rule, under which a particular impact on a property owner is always a taking. The second imposes an intermediate heightened scrutiny standard in situations where the Court perceives inequality of bargaining power.²²⁰ In other words, the most predictable factor in the varied outcomes²²¹ seems to be the way in which the takings question is framed from the property owner's perspective or from the government's perspective. The resulting takings inquiry therefore emphasizes one side's interest and minimizes the other. In *Armstrong v. United States*,²²² Justice Brown offered the classic rationale for equating certain exercises of governmental regulatory power with the eminent domain power: the purpose of the notion of takings is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and

property ownership for centuries had limited the uses to which individual owners could put their property . . . so as to preserve the stability of the traditional agrarian economy over the long run . . . In the early nineteenth century, many of these traditional restrictions fell away as American courts overturned these 'anti-developmental' property rules and replaced them with market-oriented, pro-development doctrines so as to encourage what the legal historian J. Willard Hurst (1956) called the 'release of entrepreneurial energy.'").

218. See, e.g., *Dolan v. City of Tigard*, 512 U.S. 374, 377 (1994); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1005 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 827 (1987).

219. See, e.g., *Lucas*, 505 U.S. at 1019.

220. See, e.g., *Dolan*, 512 U.S. at 374; *Nollan*, 483 U.S. at 825.

221. See generally John Martinez, *A Critical Analysis of the 1987 Takings Trilogy: The Keystone, Nollan and First English Cases*, 1 HOFSTRA PROP. L.J. 39 (1988).

222. 364 U.S. 40 (1960).

justice, should be borne by the public as a whole.”²²³

Eminent domain involves the claim of taking the right to keep one's property. This is not merely a compensation issue, but also a takings issue. Regulatory takings doctrine evaluates the right to use one's property and the extent of the right to the highest and best use of land and to create new economic value from land. The Court's intention has been to protect the ability of property owners to, in effect, resist governmental decisionmaking in two ways. First, this is accomplished by providing additional protection against arbitrary decisionmaking and affirming well-considered planning that is neither arbitrary nor capricious where there is average reciprocity of advantage. The second way is by ensuring that particular owners have not been singled-out for arbitrary treatment. The way in which the *Penn Central* Court conducted its ad hoc fact-based analysis of the claim is quite instructive. It illustrates the different dimensions of the inquiry into when government regulation has gone too far and property rights have been impaired.

C. Regulatory Takings Analysis of the Political Process Through a Government Lens

The aspect of the takings claim considered most salient is the economic impact of the regulation. According to the Court, a diminution in value has to be substantial in order to distinguish it from the ubiquitous economic impact attendant with most government land regulation. In other words, mere diminution in value, standing alone, cannot establish a taking.²²⁴ Instead, diminution in value must be combined with “something else,” to amount to a taking. That “something else” could be, for example, being singled out for discriminatory treatment.²²⁵ In *Penn Central*, because the challenged landmark law was part of a comprehensive plan of land use regulation,²²⁶ it could not involve a singling out or “few are burdened” problem.²²⁷

The pure property rights approach to taking would be to conceive of the

223. See *id.* at 49; see also Michelman, *supra* note 210, at 1216-17 (discussing being subject to the control of political majorities as a compensable occasion).

224. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 131 (1978).

225. Singling out touches on the Equal Protection dimension of takings analysis. See *Nollan*, 483 U.S. at 835 n.4.

226. *Penn Cent. Transp. Co.*, 438 U.S. at 132 (“[L]andmark laws are *not* like discriminatory, or ‘reverse spot,’ zoning: that is, a land-use decision which arbitrarily singles out a particular parcel for different, less favorable treatment than the neighboring ones.”) (emphasis added). The opinion's reference to discrimination through reverse-spot zoning suggests that diminution in value arguments must be accompanied by an arbitrary unjustified decision or in other words, diminution in value must present a substantive due process problem. Otherwise, diminution in value standing alone with a regulation with a *substantial relationship to a legitimate government purpose that's part of a comprehensive set of regulations* will not constitute a taking.

227. *Id.* at 133; *Hadacheck v. Sebastian*, 239 U.S. 394, 409 (1915); *Miller v. Hoeschler*, 105 N.W. 790, 792 (Wis. 1905). Disparate severity of impact is not enough to establish singling out.

taken property as the entirely distinct property right, in the form of Penn Central's air rights and the owner's expectations to have use of those property rights for economic gain. The Court rejected this "conceptual severance" claim that 100% of the air rights had been taken, articulating instead a "parcel as a whole" rule:

"Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole²²⁸

Takings doctrine, however, indirectly acknowledges certain property expectations as a cognizable loss of a stick in the bundle of property rights. First, a claim of deprivation of a discrete property interest can escape the unacceptability of being a conceptual severance claim when there are distinct investment-backed expectations.²²⁹ Second, the Court acknowledged property expectations when it supported the landmarks law by reasoning that the plaintiffs were not harmed because the regulation did not interfere with the present uses; they could continue to use the property as they were and earn a reasonable return on their investment. According to the Court, this case was not even as sympathetic as other cases in which the governmental acts interfered with the present uses of the properties, and yet no taking was found.²³⁰ Because the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel,²³¹ then the claim must be rejected. Of course, this reasoning ignores that Penn Central argued for a right to develop, a right to create new value out of its property.

Also instructive of the takings principles important to the ad hoc analysis is the imperfect, transferable development rights program, offered in the landmarks law as some sort of offset or compensation for Penn Central.²³² This reasoning seems contradictory, particularly since the opinion rejected the argument that any

228. 438 U.S. at 130-31.

229. The reference to those expectations actually was mentioned in an attempt to distinguish *Pennsylvania Coal v. Mahon*'s acceptance of a conceptual severance claim by characterizing that decision as being about "distinct investment-backed expectations" and by implication, not about conceptual severance. *Id.* at 127 (citing *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415-16 (1922)) (*Mahon* is "the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'").

230. 438 U.S. at 136 ("Unlike the governmental acts in *Goldblatt*, *Miller*, *Causby*, *Griggs*, and *Hadacheck*, the New York City law does not interfere in any way with the present uses of the Terminal [A]ppellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions.").

231. *Id.*

232. *Id.* at 137.

regulatory takings had occurred because diminution in value standing alone was not enough of a basis for a takings claim. However, this prong of the opinion actually relates more to the reasonableness of the program—that government had sought to be somewhat accommodating and attempted to ameliorate, albeit imperfectly, the impact of the regulation. Although not required to do so in order to pass muster under a takings analysis, it bolstered the planning that went into crafting the regulatory program—it had tried to be fair. In other words, where the regulation is substantially related to the promotion of the general welfare²³³ and the present uses are not impaired, and a claim of negative economic impact stands alone without substantive due process violations, there is no taking. Primary expectations or investment-backed expectations are not impaired.²³⁴

The overall lesson of *Penn Central* with respect to development disagreements is to defer to the government's exercise of police power. The decision announced a rule that was intended to definitively signal that takings analysis was to be deferential to exercises of governmental regulatory power if certain conditions existed to ensure that the decision was not arbitrary, and exercises of regulatory power are presumed to contain no substantive due process violations where the challenged regulation was part of a well-considered plan. This government-focused regulatory takings decision thus shows a presumption of the validity of government regulation. Nevertheless, the no-takings calculus also pays attention to attempts to be fair as part of the reasonableness calculation. Concrete and demonstrable attempts to be fair by addressing legitimate property expectations are part of the calculation of the reasonableness of a redevelopment scheme.

D. Regulatory Takings and Development Disagreements from the Property-Owner's Perspective—Conceptual Severance Revisited

The flip side of the government-focused regulatory takings analysis is the property rights-based analysis and a receptiveness to conceptual severance—focusing on whether an aspect or dimension of property rights has been impaired.²³⁵ The conceptual severance approach is further divided into two approaches. The first is the categorical approach under which a particular impact on a property owner is always a taking. The second is to impose an intermediate, heightened scrutiny standard in situations where the Court perceives inequality of bargaining power.²³⁶

233. *Id.* at 127, 138.

234. The Court later deviated from this government-focused deferential, anti-conceptual severance, severe impact combined with arbitrary government decisionmaking take on regulatory takings in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), which resorted to a categorical rule based on a conceptual severance claim of physical occupation. This claim was then not acknowledged to be a conceptual severance claim, but viewed as a physical occupation claim. *Id.* at 427.

235. *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

236. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*,

The cases illustrate that strong property owner protections are not easily reconcilable with deference to government prerogatives or government judgments. For example, the opinion in *Kaiser v. Aetna*,²³⁷ though contradictory and more of an illustration of results-oriented jurisprudence, is instructive of the relevant property rights interests when considering takings claims from the property owner's perspective. These include the right to exclude, property owners expectations, and detrimental reliance. Of these, the right to exclude and the owner's substantial financial investment were the predominant concerns.²³⁸ Any precedent for deference to government was eliminated by the government's supposed complicity in the owner's investment. Granting a dredging permit, which was an implied consent to the investment.²³⁹ *Kaiser's* overall lesson is that government complicity in creating or allowing an investment equitably estops the government from retreating from supporting that investment. In the redevelopment and gentrification context, this suggests that the individuals driven out were those encouraged to invest in the city by the City. Because they held the city together a protectible property interest in remaining in the community, seeing that investment and commitment come to fruition, or continuing to enjoy that investment should be acknowledged.

1. *Conceptual Severance and Investment Backed Expectations from the Property Owner's Perspective.*—Notwithstanding *Penn Central's* rejection of conceptual severance, the Court in *Lucas v. South Carolina Coastal Commission*²⁴⁰ looked at the matter from the property owner's perspective. The Court regarded the loss of even a strand in the bundle of property rights as very important.²⁴¹ In particular, the right to decide to retain ownership is as fundamental to property ownership as any other right.²⁴² The property owner was prevented from developing two small parcels of land with attractive use value and lucrative development potential as residential beachfront property.²⁴³ The case squarely confronted the question of what to do about the competing goals of development and wanting to maximize financial investment for profit and the

483 U.S. 825 (1987).

237. 444 U.S. 164 (1979).

238. *Id.* at 174-75.

239. Though oriented to the interests of the property owner, the *Kaiser* majority opinion was consistent with *Penn Central*, that there was no real balancing of the competing interests. No deference could eliminate the problem that, in the majority's view, a compensable property interest had been impaired. This is consistent with both the *Loretto* line of cases which are called physical takings, as well as part of *Penn Central* by its emphasis on the economic impact; interference with investment-backed expectations, and the character of the government regulation.

240. *Lucas*, 505 U.S. at 1003.

241. *Id.* at 1027.

242. *Id.* at 1028-29.

243. In keeping with the view that our vision of property's value and the most important stick in the bundle being the right to exclude, in the early nineteenth century, the beach was referred to as a wasteland; its aesthetic use value was not fully appreciated by anyone at all. See *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805).

goal of environmental preservation. Though situated in the hardened framework of property rights analysis, the underlying question was, what does fairness dictate?

Lucas's inability to exploit the economic potential of the land by developing his parcel was equated to the "essential right to exclude stick" in the bundle of property rights. Thus, the Court found a balancing approach to the takings question inappropriate because the severe impact on the property owner trumped the governmental interest.²⁴⁴ Deference to governmental regulation "d[id] not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses."²⁴⁵ Instead, categorical treatment was necessary. Although it took much logical work to supportably reach this conclusion,²⁴⁶ the result was a categorical rule for takings where there was elimination of value. It is difficult to imagine, however, what regulatory circumstance would result in a hundred percent elimination of property value.²⁴⁷

As in all regulatory takings cases, the real issue not addressed in *Lucas* is the development disagreement. The whole doctrine of regulatory takings has been raised around the question of whether the government can impose regulatory harm on a property owner. Yet, the question is impossible to resolve sensibly because the issue is framed in competing versions of the doctrine.²⁴⁸ Once the issue goes past physical appropriation, any takings analysis runs into the overwhelming power and interest in governance contained in police power. Property owners are supposed to protect their interests through the democratic process. By declaring that certain property rights always trump government regulation that is otherwise not corrupt or arbitrary or capricious,²⁴⁹ regulatory takings analysis in effect acknowledges the shortcomings of the local political process. The Court in *Lucas* used property law to give property owners an "out" from disagreements over development, thus, in effect, creating a "right to development." Using property law to mediate with government on behalf of property owners in this manner specifically fails to acknowledge the subjective, gut-based, substantive decision made about what are fair property owner expectations and what are fair, or unfair, government actions.²⁵⁰

244. Interestingly, *Lucas* is really a temporary takings case. The Beachfront Management Act was amended to allow for special permits in 1990, two years after the complained of 1988 amendments, yet the Court proceeded to decide the case because Lucas would be denied a remedy for the two years during which he had been denied the ability to build. Thus, there was temporal conceptual severance in this case. *Lucas*, 505 U.S. at 1012.

245. *Id.* at 1017.

246. *Id.* at 1022-23, 1025 n.12, 1027, 1031.

247. See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 321-22 (2002) (discussing the rareness of 100% elimination of value).

248. See, e.g., *Lucas*, 505 U.S. at 1003; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

249. See, e.g., *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 754 n.13 (1999).

250. Even more so, beyond this lack of acknowledgment, there has been a decision to protect

Instead, the *Lucas* Court responded to the development versus preservation dilemma by fashioning an unworkable categorical rule that total elimination of value was a per se taking unless justified by common law understandings from the nineteenth century. This is a significant example of a masked exercise of substantive due process. The decision attempted to structure legal doctrine as a bulwark against any justification for modern governmental decisionmaking that might retard land development. The decision therefore embraced a right to development and acknowledged it as part of the expectation of land ownership. The increasing economic value of land, not for its productive features, such as agriculture, but for its use features as a place of residence or commerce, raises the question, what happens if land is no longer available under government regulation for the desired use? In some ways, the Court's approach is not without precedent and makes perverse sense. As discussed above, the common law of this country has traditionally promoted the free use and development of land.²⁵¹ Today, it seems that the community's expectation of land has evolved such that an expected right to development—regardless of whether it is in fact a right—has been granted increasing recognition by the Supreme Court. Recognizing community standards for this evolving economic expectation certainly has implications for the urban side of eminent domain law. In particular, would a categorical rule be called for in certain exigent circumstances when there is a political process failure in the eminent domain context?

2. *Inequality of Bargaining Power and Political Process Failure in the Context of Development: Heightened Scrutiny and Expectation.*—The *Nollan v. California Coastal Commission*²⁵² and *Dolan v. City of Tigard*²⁵³ decisions are regulatory takings cases that deal directly with development disputes between property owners seeking to expand the development of their properties and the difficulty of negotiating with government. In both cases, the right to cross someone's land in return for the right to develop was subjected to heightened scrutiny and held to a strict means-ends standard of fairness and appropriateness. In both cases, the Court intervened and elevated the individual's right to be free

economically beneficial uses; while this sounds hard and fast, it is an arbitrary selection to the benefit of the property owner. This is seemingly consistent with the eminent domain reliance on fair market value to compensate owners even when there is significant personal loss, except that concept is to the benefit of the government. See Lynda J. Oswald, *Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 WASH. L. REV. 91, 123 (1995).

251. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394, 413-14 (1915) (no taking when prohibited activity could be performed elsewhere). But see *Lucas*, 505 U.S. at 1059 (Blackmun, J., dissenting) (“[S]tate courts historically have been less likely to find that a government action constitutes a taking when the affected land is undeveloped . . . [T]he power of the legislature to take unimproved land without proper compensation was [also] sanctioned by ‘ancient rights and principles.’”) (emphasis added) (quoting *Lindsay v. Comm’rs*, 2 S.C.L. 38, 57 (S.C. Ct. App. 1796))) (emphasis added).

252. *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

253. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

from the Government's strong-arming in negotiations to a constitutionally protected property right. Both *Nollan* and *Dolan* were analyzed from the property owner's perspective with no balancing of the competing interests.

The Nollans's desire to enlarge a tiny, dilapidated, single-story bungalow along the California coast into a two-story, three-bedroom house with a two-car garage was restricted by California's strict regulation of coastal development.²⁵⁴ The grant of the Nollans' application for a coastal development permit was conditioned upon their provision of "lateral access to the public beaches in the form of an easement across their property."²⁵⁵ They claimed that this condition constituted a taking of their property,²⁵⁶ and the Court was receptive to their claim.²⁵⁷ The Commission's requirement of an easement as a condition to receiving the coastal permit meant that the substance of the permit requirement compromised the right to exclude.²⁵⁸ Also, the manner of acquiring the easement violated the Fourteenth Amendment by using an improper unilateral form of bargaining.²⁵⁹

The *Nollan* opinion seems to have utilized a substantive due process analysis whereby the Court's consideration of the existence of a taking was necessarily informed by a disagreement with the nature of the underlying regulation.²⁶⁰ The opinion begins with the observation: "We have long recognized that land-use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'"²⁶¹ "[U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out and out plan of extortion.'"²⁶² Consistent with the "substantially advances" prong of the *Agins v. Tiburon* test²⁶³ (now repudiated in *Lingle v. Chevron*²⁶⁴), the Court announced an "essential nexus" standard for such

254. *Nollan*, 483 U.S. at 827-29.

255. *Id.* at 829. "The Commission . . . had similarly conditioned 43 out of 60 coastal development permits along the same tract of land." *Id.*

256. *Id.*

257. *Id.* at 836.

258. *See id.* at 831-32.

259. *Id.* at 832.

260. *See id.* at 838-39.

261. *Id.* at 834 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 529 (2005)). The difference in the formulation of the *Agins* standard is striking. In *Lucas*, the Court used an "or" formulation which supported the conclusion that diminution in value standing alone was enough for a regulatory takings. In this case, the "and" standard is conveniently supportive of the means-end test formulated by the Court.

262. *Id.* at 837 (quoting *J.E.D. Assoc., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)); *see also* *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (further characterizing the permit condition as "gimmickry").

263. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), *abrogated by* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

264. 544 U.S. 528 (2005).

conditions and found that this condition failed the test.²⁶⁵

Nollan appears to be primarily about the Supreme Court reacting protectively to an inequality of bargaining power between local government and citizens who wish to develop. The Court sought to weigh in on behalf of the property owner.²⁶⁶ This is colorfully illustrated by the majority opinion's use of terms like "extortion"²⁶⁷ and "leveraging of the police power."²⁶⁸ To extort is defined as "to obtain from a person by force, intimidation or undue or illegal power."²⁶⁹ The particular impact on the property owner, of being required to convey a property interest like an easement as the condition for obtaining a permit to develop, was deemed to present the "heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective."²⁷⁰ Under the articulated standard in the case, the propriety of this decision could only be reached by the Court's eschewing the deferential standard of the "reasonable relationship test" and adopting a higher standard such as "substantially advances a legitimate governmental interest."²⁷¹ Thus, the proposed bargain, impacting the right to exclude imposed by the government, was, at best, suggestive of a substantive due process violation.

Requiring the government to provide a precise connection between the increased impact of the proposed development and the permit condition makes sense only in the abstract, removed from the actual context of governing. In reality, the government is responsible for meeting multiple, often conflicting public needs. Coastal protection perfectly reflects the tradeoffs between many public needs.²⁷² Because government has to accommodate many interests, and has accommodated many interests in the past, the opinion does not explain why government cannot juggle these many accommodations by offsetting the management of one while obtaining a concession on the other.²⁷³ In other words, if visual access is decreased, why can the government not compensate for that decrease, or balance out that decrease by securing another concession that would be otherwise beneficial to the public? Although beach access in no way compensates for the loss of view, it shifts the public rights and public benefits in

265. *Nollan*, 483 U.S. at 837.

266. *See id.* at 839.

267. *Id.* at 837.

268. *Id.* at 837 n.5.

269. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 440 (1991).

270. *Nollan*, 483 U.S. at 841.

271. *But see* *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 532 (2005) (explicitly repudiating the "substantially advances" heightened standard of review in regulatory takings cases). The opinion states that the Court considers *Nollan* good law as an unconstitutional condition requiring a person to give up a constitutional right in return for some government action. *Id.* at 546; *see* Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions*, 58 HASTINGS L.J. 729, 730-31 (2007) (arguing that "exactions decisions sit uneasily alongside . . . *Lingle* to make sense of its long, confusing line of takings decisions").

272. *See, e.g., Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1009-10 (1992).

273. *See Nolan*, 483 U.S. at 825.

a way that is beneficial to the public.²⁷⁴ Narrowly viewing the issue as a loss of a strand from the bundle of rights—the right to exclude—ignores this very compelling context and allows property owners to narrowly conceive of and enforce their property rights, regardless of public concessions that secure and enhance these property rights.²⁷⁵

Nollan involved homeowners who were opposed to sharing the beach with the public and a Court that agreed they were right to object. The Court disagreed that the government should be able to do anything short of a forced purchase to impair that expectation of immunity from public access across their property, even where economic injury does not exist.²⁷⁶ The Court considered it unconscionable for government to use its regulatory might to allow strangers to occupy one's land. How did an easement get equated with quartering troops on one's land if the impact was minimal at best? The Court's willingness to acknowledge impairment of the landowners' agency to exercise a right is apparent. Also evident was a sense that fundamental fairness was violated because the government always has more muscle to win. Thus, *Nollan* stands for the principle that there is a fundamental right not to be strong-armed by government because of the unequal bargaining power between citizen and government.²⁷⁷ This is a neo-classic concern with the inequality of bargaining

274. Justice Brennan's dissenting opinion points out the obvious reciprocity of advantage view of this case:

[The] development obviously significantly increases the value of appellants' property; appellants make no contention that this increase is offset by any diminution in value Furthermore, appellants . . . benefit from the . . . permit condition program. They are able to walk along the beach beyond the confines of their own property only because the Commission has required deed restrictions as a condition of approving other new beach developments.

Id. at 856 (Brennan, J., dissenting).

275. J. David Breemer, *The Evolution of the "Essential Nexus": How State and Federal Courts Have Applied Nollan and Dolan and Where They Should Go from Here*, 59 WASH. & LEE L. REV. 373 (2002); Lee Ann Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1 (2000); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609 (2004); see also Carlson & Pollak, *supra* note 16, at 115-16 (study indicating "*Nollan* and *Dolan* penalize ad hoc decisions to impose exactions . . . but may actually encourage the imposition of higher impact fees").

276. See *Nollan*, 483 U.S. at 857 (Brennan, J., dissenting) ("Ultimately, appellants' claim of economic injury is flawed because it rests on the assumption of entitlement to the full value of their new development. Appellants submitted a proposal for more intensive development of the coast, which the Commission was under no obligation to approve, and now argue that a regulation designed to ameliorate the impact of that development deprives them of the full value of their improvements. Even if this novel claim were somehow cognizable, it is not significant. '[T]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests.'") (quoting *Andrus v. Allard*, 444 U.S. 51, 66 (1979)).

277. The view that it is the impact on a few for the benefit of the many fails to explain the outcome. It seems instead there is a sense of entitlement to have a beach house consistent with

power. The Court is in effect saying that imposing standards to make the exercise of unequal power fair is important. These standards are usually read into contracts between individuals, where one is poor, uneducated, and unaware of his or her rights, or is desperate enough to waive fundamental rights and make deals that are detrimental to his or her interests. Here, the citizens are affluent, educated, and aware of their rights, and are arguably making a deal that benefits their interests. Nevertheless, this bargaining inequality is inimical in the Court's view and demands the Court's intervention.²⁷⁸

In *Lingle v. Chevron*,²⁷⁹ the Court used a challenge to a gas service station regulation capping rents, which did not involve a regulatory taking, to clarify regulatory takings doctrine and the appropriateness of substantive due process reasoning. The Court repudiated any suggestion that substantive due process analysis belonged in regulatory takings doctrine.²⁸⁰ The Court attributed the source of the doctrinal confusion to be *Agins v. City of Tiburon*'s²⁸¹ "substantially advances" standard which used an impermissibly heightened means-ends test.²⁸² Though *Nollan* (and *Dolan*) used the substantially advances test, the Court identified a new source of precedent that supported those decisions. According to the Court, these cases could survive decoupling from *Agins*'s heightened substantive standard by viewing them as drawing their rationale from another line of doctrine known as "unconstitutional conditions."²⁸³ This ad hoc line of cases prohibits government from conditioning receipt of some benefit upon the surrender of a constitutional right. Curiously, the constitutional rights protected in prior "unconstitutional conditions" cases involved civil rights like freedom of speech and religion. *Nollan* and *Dolan* represent the first set of cases to equate property rights with fundamental civil rights.²⁸⁴

Notwithstanding *Lingle*'s attempt to inoculate *Nollan* and *Dolan* from the heightened means/end test, the *Nollan* essential nexus test, and the rough proportionality standard, the opinions are clear in expressing a judicial disagreement with the underlying reasons advanced for the exaction or condition posed by the legislation. Thus, both *Nollan* and *Dolan* provide a detailed and difficult analytic regime for municipalities to provide a factual basis for their

affluent expectations of privacy and exclusion of the public.

278. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703-04 (1999) (upholding a \$1.45 million jury verdict for landowners where they sought to develop an ocean-front parcel, but were impeded by arbitrary delay and denial by local government).

279. 544 U.S. 528 (2005).

280. *Id.* at 545-48.

281. 447 U.S. 255 (1980), *abrogated by Lingle*, 544 U.S. 528.

282. See Jane B. Baron, *Winding Toward the Heart of the Takings Muddle: Kelo, Lingle and Public Discourse About Private Property*, 34 *FORDHAM URB. L.J.* 613, 637 (2007).

283. *Lingle*, 544 U.S. at 547-48.

284. See ROBERT B. STANDLER, *DOCTRINE OF UNCONSTITUTIONAL CONDITIONS IN THE USA* 3 (2005), available at <http://www.rbs2.com/duc.pdf> (summarizing the cases and articles about unconstitutional conditions).

legislative decisions.²⁸⁵ The Court's opinion provides a detailed analytic regime for municipalities to prove the validity of their legislative decision.²⁸⁶

Dolan is a more sober and balanced opinion than *Nollan*. It is written from both the government's and the property owner's perspectives because the case had to venture where *Nollan* did not. The *Dolan* Court acknowledged the right of the government to regulate and define the connection between the condition and the government regulation, thus defining how far this exaction regulation could go.²⁸⁷ The question turned upon whether the supporting "findings [were] constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit."²⁸⁸ After surveying various state standards, the Court stated it was selecting the intermediate standard requiring a reasonable relationship, which it translated to mean a standard of "rough proportionality." "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."²⁸⁹

The Court invalidated the conditions for failing the first prong of essential nexus²⁹⁰ and failure of rough proportionality.²⁹¹ Though this opinion was arguably more balanced than *Nollan*, it suffers from the same substantive defect. The Court was influenced by gut-felt fundamental fairness principles in fashioning the unprecedented "rough proportionality" standard. Moreover, the Court refused to "cut local government any slack," instead holding them to an exacting and expensive standard of justifying government actions with very precise studies individually tailored to the impacts of individual property owners. Although such studies can only come at great cost, it is possible to find a consultant to conduct studies to support one's actions. This requirement of "more paper" signals that the Supreme Court was willing to intervene to equalize the bargaining power between government and citizen by raising the costs of justifying what were likely well-founded exercises of regulatory power in

285. See *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987). But see generally D. Benjamin Barros, *At Last, Some Clarity: The Potential Long-Term Impact of Lingle v. Chevron and the Separation of Takings and Substantive Due Process*, 69 ALB. L. REV. 343 (2005).

286. *Dolan*, 512 U.S. at 391, 398 (rough proportionality and individualized determination); *Nollan*, 483 U.S. at 837 ("essential nexus").

287. *Dolan*, 512 U.S. at 388 ("[W]hether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development." (citing *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987))).

288. *Id.* at 389.

289. *Id.* at 391.

290. *Id.* at 394-95 ("We conclude that the findings upon which the city relies do not show the required reasonable relationship between the floodplain easement and the petitioner's proposed new building.").

291. *Id.* at 395-96 ("No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.").

furtherance of the public welfare. The *Dolan* decision imposed an impediment that could slow the government down and limit the scope of what it could accomplish through exactions. Where a property owner substantially disagrees with the exercise of a governmental regulatory power, *Dolan* tipped the balance of power between government and citizen in favor of the citizen as property owner.

The most striking aspect of the implicit role of unequal bargaining power in the Supreme Court's property rights jurisprudence is that the property owners do not fit the profile of people who are typically protected under the inequality of bargaining power rationale. The owners are neither uneducated, disabled, elderly, or impoverished. They are, in fact, the opposite—owners of lucrative pieces of real estate who are able to reach the Supreme Court to vindicate rights based on principle rather than on irreparable or severe harm.²⁹² What about these property owners triggers the inequality of bargaining power scrutiny? It can only be the view of the government as an overly powerful entity that poses threats to property owners beyond the ability of any individual property owner to address their complaints or concerns through the political process. Because the opinions are silent about the need or ability of property owners to seek redress through the political process, the Court then may be led to believe such processes to be unavailing or too costly.²⁹³

In effect, the *Nollan* and *Dolan* cases evince a concern that property owners who wish to develop have been singled out. While this singling-out is not of any great economic detriment, it raises Fourteenth Amendment Due Process concerns by interfering with the property owner's expectation to exploit the economic potential of his or her property. The categorical rules signal that it is arbitrary and capricious or unreasonable for the government to thwart the desire or expectations of a property owner who seeks to develop, merely because the owner is fortunate enough to own beachfront or waterfront property, as in *Dolan*. Thus, the regulatory takings cases represent the landed privileged who should essentially be immune from disadvantage because they own desirable land. The privileges and benefits that attend to this form of property ownership are particularly troublesome to the Court.²⁹⁴ Apparently privileged property ownership should be more protected from government interference or from the needs of the public.

*E. Implications of Attempting to Split the Difference in Perspective
Between Government and Property Owner: Reigning in the
Categorical but Maintaining the Warning to Government*

In *Tahoe-Sierra*, the Court returned to the government-focused analysis of regulatory takings cases.²⁹⁵ The decision reflects the Court's struggle to mediate

292. See *id.* at 379; *Nollan*, 483 U.S. at 828-30.

293. See generally *Dolan*, 512 U.S. 374; *Nollan*, 483 U.S. 825.

294. See, e.g., *Nollan*, 483 U.S. at 831-32.

295. See *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

a balance between the two approaches in simultaneous retreat from, but acceptance of, the more property-based approach to regulatory takings. The retreat results from recognition that the natural trajectory of the stronger property-based takings decisions like *Lucas*²⁹⁶ and *First English*²⁹⁷ presented administrability problems. The Court's refusal to overrule any property-based precedent signals that governments should take note and be careful in land use regulation.

Tahoe-Sierra reflects the battle between *Penn Central*'s balancing approach to takings and the combination of *First English* and *Lucas* gut-satisfying, categorical, conceptual severance approach to takings.²⁹⁸ The *Tahoe-Sierra* property owners were apparently powerless to affect a very complex and technical planning and political process. In some ways, their only leverage was to impose a financial penalty on the government for failing to devise a timely plan.²⁹⁹ Thus, even if they did not have the political clout to move the process along, this leverage provided at least a more consequential voice because it exacted a financial penalty on the government for delaying the owners' personally beneficial use (building on their lots and enjoying the lake for themselves).³⁰⁰ Similarly, they could have financially benefited from developing their lot and enjoying the lucrative advantage of improving the value of the parcel and creating an economic opportunity for themselves.

The majority opinion explained that a temporary moratorium is neither a taking nor not-a-taking. The answer would depend on the particular circumstances of the case.³⁰¹ The opinion then corralled the categorical rules from *Lucas*.³⁰² Physical occupation cases are not precedent for evaluating a claim of a regulatory taking.³⁰³ The Court seemed to imply that regulatory takings do not therefore represent as great an affront to individual property rights. While a categorical rule might be appropriate for a physical occupation, in the regulatory taking context, the categorical rule will only apply when there has

296. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

297. *First English Evangelical Church v. County of Los Angeles*, 482 U.S. 304 (1987).

298. *See Tahoe-Sierra*, 535 U.S. 302.

299. *Id.* at 310-12.

300. *See id.* Interestingly, this was one of the arguments advanced but never granted any cognizance by the Court.

301. *Id.* at 331.

302. The examples offered by the majority opinion illustrate that the physical part of takings law does not make much sense because what is physical? Is the physicality the source of the purported harm or is it the magnitude of the impact of the regulation that is the source of the harm? *See id.* at 330 (explaining the *Lucas* rule based on "extraordinary circumstances") (citing *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1018 (1992)).

303. *Id.* at 322. Physical takings are still at the takings end of the continuum and categorically require compensation. "When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner regardless of whether the interest that is taken constitutes the entire parcel or merely a part thereof." *Id.* (citation omitted)

been permanent obliteration of the value of a fee simple estate. This must be an obliteration of 100% of the value of the parcel; a mere 95% would not be enough of a diminution to justify categorical treatment.³⁰⁴ Instead, the operative default rule for determining when a regulatory taking has occurred requires a fact-specific inquiry.³⁰⁵ The matter turns on whether the issue presents a question of whether there is an interest in protecting individual property owners from bearing public burdens, “which in all fairness and justice should be borne by the public as a whole.”³⁰⁶ This statement brings us full circle to the purpose of the taking inquiry—determining when it is unfair as a matter of property rights to single out certain property owners from an Equal Protection perspective guided by a substantive Due Process assessment of fairness. The anti-subordination rationale is clear; it looks to the impact of the deprivation as compared to others and assesses its fairness.

Similar to *Lingle*’s determination to rescue *Nollan* and *Dolan*, perhaps the weakest aspect of *Tahoe-Sierra* is that it affirms the validity of the *Lucas* Court’s finding a permanent deprivation of all value when, in reality, Mr. Lucas did not suffer a permanent deprivation of all value.³⁰⁷ The regulation was not permanent. Without permanence, the permanent deprivation of value did not actually occur. Yet the *Lucas* case precipitated a categorical rule stating that there was a permanent deprivation.³⁰⁸ The petitioners’ arguments in *Tahoe-Sierra* for similar categorical treatment make sense as long as *Lucas* is retained as good law. Why did *Tahoe-Sierra* decline to follow the absolutist language and reasoning of *Lucas* and *First English*? The primary reason is that the rules announced, notwithstanding their emotionally gratifying categorical protections from the excess of government interference with private property rights, were unadministrable. Regulatory takings cases are really about fairness rather than any bedrock coherent right of property. Within the constraining rubric of property rights, the taking principle admits of no limit—government regulation necessarily diminishes the free use of property. While the reciprocity of advantage rationale in *Penn Central* is appealing to some, to others that approach to protection of property rights is too diffuse and indirect. On the other hand, the absolutist vision of regulatory takings admits of no limits, and any attempt to signal limits results in rules that are difficult, if not impossible, to apply consistently.

One might conclude that the *Penn Central* standard re-invoked in *Tahoe-Sierra* means that local governments need not worry about regulatory takings claims. Instead, notwithstanding *Lucas*’s banishment to the margins of regulatory takings jurisprudence, it is significant that *Lucas* was not overruled.³⁰⁹

304. See *id.* at 330 (citing *Lucas*, 505 U.S. at 1019 n.8 (noting that the categorical rule does not apply to diminutions in value of 95%)).

305. *Id.* at 332.

306. *Id.* at 321 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

307. See *Lucas*, 505 U.S. at 1020 (discussing limits on Mr. Lucas’s land).

308. See *id.* at 1017.

309. The same can be said of *Nollan*’s and *Dolan*’s similar, yet less convincing, banishment

The Court backed away from the unadministrability of categorical rules, but the cumulative effect of the past twenty years of regulatory takings jurisprudence cautions local governments. The decision still serves the practical purpose of signaling the theoretical limit to governmental action. It warns government that regulations should not be permanent when they can be made temporary. While this suggests that the government need only put an expiration or sunset date on a regulation to remove it from *Lucas*'s purview, it still lays out a theoretical limit that puts government on notice of situations in which governmental justifications will be irrelevant, average reciprocity of advantage arguments will be unavailing, and the impact on the property owners will trump the public interest.

Also, the categorical rules still lurk, perhaps not to be reinstated in their full form, but still threatening enough to be partially resurrected if the local government's actions shock the conscience of the property-rights-minded judge.³¹⁰ Therefore, local governments are on notice to proceed carefully in managing suburban development and should consider compensating in advance, whenever possible, or providing a quid pro quo to forestall the next unpredictable set of takings arguments.

III. CRITICAL ANTI-SUBORDINATION LESSONS FOR THE WELL-CONSIDERED PLAN: TOWARD A MEANINGFUL STANDARD

Acknowledging the underlying reality of regulatory takings, anti-subordination concerns serve two purposes. First, they focus attention on harms that may not be directly cognizable under traditional Equal Protection or Due Process doctrine. Second, and more importantly, they allow a move past the strictures of property rights language typically used to challenge exercises of eminent domain. This expands the eminent domain discussion to acknowledge the complexity of interests at play in disagreements over development. The context for redevelopment suggests that globalization is driving the subordination inherent in redevelopment as well as simultaneously strengthening the need for local economic development.³¹¹ As Margit Mayer observes, cities are trying to remake themselves to keep up with international competition; the higher up they are in the chain of global cities, the more imperative it is that they provide advanced services and the more intense the restructuring of urban space.³¹² "Local political actors everywhere emphasize economic innovation, seek

to the margins of regulatory takings jurisprudence as mere land exactions that wreak unconstitutional conditions. The banishment cannot negate the implied recognition of inequality of bargaining power as a motivation for this doctrinal detour. Moreover, it fully supports the Court's loud signal to local governments about a categorical definition of unfairness that they should take care to avoid. *See, e.g., Dolan v. City of Tigard*, 512 U.S. 374, 385 n.6 (1994).

310. *See, e.g., Lucas*, 505 U.S. at 1014-16 (discussing the categorical rule of compensating for regulatory takings).

311. *See supra* Part I.A-B.

312. Margit Mayer, *Urban Social Movements in an Era of Globalisation*, in *URBAN MOVEMENTS IN A GLOBALISING WORLD* 141, 143 (Pierre Hamel et al. eds., 2000).

entrepreneurial culture, and implement labour market flexibility in order to counter the crisis of Fordism and to meet intensified international competition. Other policy areas are increasingly subordinated to these economic priorities.”³¹³

Thus, the globalization imperative is real. But this imperative also structures redevelopment in a way that certain types of people who live in certain types of places are left without a voice and without recourse in redevelopment. This expanded vision of regulatory takings doctrine here invites us to see those individuals, subordinated by redevelopment, as having a property-like interest in not being denied their effective voice in the fate of their homes, small businesses, and desire to live in their community. Regulatory takings doctrine illustrates that the Court is willing to respond to a perceived subordination in the suburban context. The language of property rights is individualistic, categorical, inadequate to the task of community, and ambiguous about the rights and interests harmed by redevelopment. A new conception of the harms and interests at stake is necessary to acknowledge how community interests should be considered. Once we drop the blinders obscuring property rights, it will be possible to see how regulatory takings anti-subordination underpinnings recognize that property is constitutive of identity and that local governments are attempting to create a new identity for their cities.³¹⁴ The categorical approach of declaring some takings invalid because they involve “economic development” while retaining the blight exception would still leave the very same neighborhoods subordinated by redevelopment disproportionately affected. These neighborhoods would continue to be burdened by a privatized public decision-making process that is properly characterized as a political process failure.

Land use and eminent domain doctrine invests local government with the power to determine or resolve the outcomes of these conflicting interests by investing government with the sole power or title of community. This sovereign view of government looks only to the formal powers of government and the content of these laws, but barely looks to the execution of these powers.³¹⁵ One approach might be to suggest local community institutions that would better represent community interests in the redevelopment decision-making process. The difficulty is that there is no unitary community; instead, there are cleavages in interests that lead to conflict when brought together.³¹⁶ Forming new local institutions is not the answer because this only results in more fragmentation. According to Crowley, “[P]luralists tend to overlook the structural imbalance in organizational capacity between elites who set agendas and other stakeholders

313. *Id.* (citing POST FORDISM: A READER (Ash Amin ed., 1994)).

314. See generally Elizabeth Blackmar, *Appropriating “the Commons”: The Tragedy of Property Rights Discourse*, in THE POLITICS OF PUBLIC SPACE 49 (Setha Low & Neil Smith eds., 2006).

315. But see *Village of Willowbrook v. Olech*, 528 U.S. 562, 564-65 (2000) (per curiam) (permitting a plaintiff “class of one” to bring an equal protection claim against the village in regards to an easement the City demanded from the plaintiff).

316. CROWLEY, *supra* note 183, at 18-19.

wishing to challenge those agendas.”³¹⁷ Thus, Crowley recommends “[c]ontentious collective action [a]s an alternative mode of participation for areas lacking regular access to government officials.”³¹⁸ It is helpful, then, to focus on two structural variables: 1) the “structure of political opportunities”³¹⁹ (the threat of disruption), and 2) “mobilizing structures.”³²⁰ These suggestions refer to both material, as well as social and structural, resources. Crowley also notes that “[n]ational and local federated organizations have been decisive in the outcomes of contention because of their independence from” what has been referred to as the pro-growth coalition.³²¹ “Community organizations that depend heavily upon urban growth coalitions for operating resources are not likely to take the lead in challenging unwanted growth and redevelopment agendas because they might risk alienating their supporters and losing access to valuable resources.”³²²

Another key issue facing community institutions is the problem of informality in the redevelopment process. So many aspects of transactions are negotiated behind closed doors and are based on interpersonal relations. As Patience Crowder observes, the need for informality in deal-making is in potentially irresolvable tension with the public’s need for transparency and information.³²³ This reinforces the reality that there is a political process failure in redevelopment. The lesson of critical race theory is that the Court must gently steer this political process by sending a substantive message of fairness and reasonableness countering subordination in redevelopment. This is accomplished by establishing substantive standards of inclusion that cities must adhere to in legislating and executing redevelopment projects.

In certain respects, the Court began to make this “political” intervention in eminent domain doctrine by conditioning the validity of the exercise of eminent domain on a well-considered development plan. With the well-considered plan offered as safeguard, it only makes sense to define standards for what is “well-considered.” This is similar to the results of the means-ends connections

317. *Id.* at 12.

318. *Id.* at 17.

319. *Id.* at 20 (quoting Peter K. Eisenger, *The Conditions of Protest Behavior in American Cities*, 67 AM. POL. SCI. REV. 11-25 (1973)).

320. See Doug McAdam et al., *Introduction*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS* 2-4 (McAdam et al. eds., 1996).

321. CROWLEY, *supra* note 183, at 22.

322. *Id.* Crowley elaborates on “mobilizing structures” noting,

The phrase “mobilizing structures” refers to resources that challengers can access and convert into vehicles for mounting and sustaining collective actions. Examples . . . include money, communications media, and meeting places, but also social structures such as family units, friendship networks, voluntary groups, work units, businesses, professional organizations, and government agencies that can facilitate resource mobilization.

Id.

323. See Crowder, *supra* note 182, at 658 (“Informality in redevelopment clouds transparency and prevents the achievement of [the] public policy [of getting information to the public].”).

required in *Nollan* and *Dolan*; the connection between a regulation's means and ends must now be justified with expert studies to provide factual support for the regulation. In the context of the "well-considered" plan, however, instead of using the means-ends match standard, the Court should actually focus on defining the "ends." Here, "well-considered" should be backed by bringing to the table the stakeholders and visionaries of urban living. We are facing enormous decisions about the future of our cities, and cities are unduly influenced by upscale private structural pressures of globalization, narrow-mindedness, copycat approaches, and investment pressures for quick returns. Ratifying plans created under this globalized context as "well-considered" without defining standards results in a political choice that favors the status quo. It also ratifies the worst of what is seriously wrong with current local economic development practices.

The difficult issue is that local governments seem to need no prompting to seek out informal relations with business elites. Thus, how can we systematically encourage local government to reach out to others in the community? What legal carrots-and-sticks can one provide to make it in their interest to seek out community? A starting point is to define substantive anti-subordination standards for the "well-considered" plan. The plans underlying eminent domain can reflect gut-felt fairness principles of inclusion and responsiveness to community perspectives. More specifically, this will require participatory institutional structures that provide training and resources to enable citizen participation in plan formulation.³²⁴

This lengthy discussion on regulatory takings suggests an argument for a heightened standard of review. But actually, as much I would like to develop such an argument, I have not seen, nor have I been able to come up with, a principled basis upon which to draw the line between proper and improper purposes. Proponents of a closer means-ends match usually throw a doctrinal wrench in the development process that may not be proportionate to the particular harm or impact of the redevelopment.³²⁵ The convergence of critical race theory and regulatory takings anti-subordination concerns looks to the context of a government decision and acknowledges the defects in the political process that hamper individual property owners or residents of certain types of

324. See generally JAMES L. CREIGHTON, *THE PUBLIC PARTICIPATION HANDBOOK: MAKING BETTER DECISIONS THROUGH CITIZEN INVOLVEMENT* (2005). Creighton notes, "This book shows how to design and conduct a public participation from beginning to end." *Id.* at 5. For additional resources on citizen participation, see HENRY SANOFF, *COMMUNITY PARTICIPATION METHODS IN DESIGN AND PLANNING* 6 (2000) (describing Nos Quedamos involvement of impoverished residents in urban renewal at Melrose Commons); Emil E. Malizia, *Structuring Urban Redevelopment Projects: Moving Participants up the Learning Curve*, 25 J. REAL EST. RES. 463, 473-76 (2003) (providing ideas for attempting to communicate lenders' expectations to community).

325. See, e.g., Nicole Stelle Garnett, *The Public-Use Question as a Takings Problem*, 71 GEO. WASH. L. REV. 934, 969 (2003) (arguing for a reasonable necessity standard of review for the public-use clause to demand factual justification for land transfers and require the government to justify how it chooses to acquire property).

communities from protecting their interests.³²⁶ What regulatory takings doctrine provides is the example of specific expressions of judicial guidance on a roadmap of concerns that local government must consider. Critical race theory provides an explicit, unapologetic acknowledgment that these disagreements about development are political. Thus, perhaps the fix to what is so unsatisfying about the *Kelo* majority opinion comes from focusing on the politics of the redevelopment process and providing a hopefully ameliorating antidote to the current state of political process failure.³²⁷ As John Hart Ely observes:

The Constitution has instead proceeded from the quite sensible assumption that an effective majority will not inordinately threaten its own rights, and has sought to assure that such a majority not systematically treat others less well than it treats itself—by structuring decision processes at all levels to try to ensure, first, that everyone's interests will be . . . represented . . . at the point of substantive decision, and second, that the . . . application will not be manipulated so as to reintroduce in practice the sort of discrimination that is impermissible in theory.³²⁸

326. The divergences are also potentially, although not necessarily, quite clear. For example, it might seem that regulatory takings is solely concerned with property owners. Justice Thomas's unique expression of concern for the systematic disadvantages to certain communities, for instance, arises because he can see disadvantage (racial and class) as it affects the property owner. *See supra* notes 90-94 and accompanying text. Yet, other types of residents, namely tenants, can also be included under the regulatory takings umbrella because strong protections of property rights necessarily involve "conceptual severance." *See* Margaret Jane Radin, *The Liberal Conception of Property: Cross-Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988) (discussing conceptual severance). Tenants are the owners of strands of property rights. Thus, tenants should be protectible under the regulatory takings property rights umbrella as well.

327. For other approaches to the role of the political process in redevelopment, see Brief for the American Planning Association et al. as Amici Curiae Supporting Respondents, *Kelo v. City of New London*, 545 U.S. 469 (2005) (No. 04-108), 2005 WL 166929, at *25-26 ("Another source of protection for all property owners is to assure, to the extent possible, that eminent domain is exercised only in conjunction with a process of land use planning that includes broad public participation and a careful consideration of alternatives to eminent domain."); Paul Boudreaux, *Eminent Domain, Property Rights, and the Solution of Representation Reinforcement*, 83 DENV. U. L. REV. 1, 1 (2005) (proposing "eminent domain be constitutionally impermissible when it is both used to take land destined for private hands and disproportionately hurts the poor or politically disadvantaged"); Elisabeth Sperow, *The Kelo Legacy: Political Accountability, Not Legislation, Is the Cure*, 38 MCGEORGE L. REV. 405, 426-27 (2007) (discussing participation in the political process and negotiation with politicians as the appropriate response to *Kelo*); *see generally* Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309 (2006) (advocating a citizenship model of property rights to create a fairness-based framework for analyzing regulatory takings).

328. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 100-01 (1980).

That political process is currently subsumed within the carefully considered redevelopment plan that *Kelo* says will ratify an exercise of eminent domain.³²⁹ As currently formulated, the Court affirmed a top-down planning process developed by the state.³³⁰ The reality is that within the field of urban planning, a plan has legitimacy not because of authority granted from the state and the convening or several meetings to merely inform residents.³³¹ For example, an international organization, the International Association for Public Participation (IAP2), has developed core values for public participation.³³²

The planning process involves certain inclusive procedural components. It is supposed to directly involve residents in articulating the needs for the area and envisioning future development, thereby receiving an opportunity to ensure that their needs are met by the resulting development.³³³ Concededly, this last point means both a procedural component to planning as well as a substantive

329. See *Kelo v. City of New London*, 545 U.S. 469, 478 (2005).

330. See generally *id.*

331. See generally Nicole Stelle Garnett, *Planning as Public Use*, 34 *ECOLOGICAL Q.* 443, 461-68 (2007) (arguing that land use planning is inadequate to limit pretextual takings or lead to more successful projects).

332. The IAP2 website states:

As an international leader in public participation, IAP2 has developed the “IAP2 Core Values for Public Participation” for use in the development and implementation of public participation processes. These core values were developed over a two-year period with broad international input to identify those aspects of public participation which cross national, cultural, and religious boundaries. The purpose of these core values is to help make better decisions which reflect the interests and concerns of potentially affected people and entities.

International Association for Public Participation, *IAP2 Core Values*, <http://www.iap2.org/displaycommon.cfm?an=4> (last visited Mar. 12, 2009).

333. See *id.* “IAP2 Core Values for the Practice of Public Participation:

1. Public participation is based on the belief that those who are affected by a decision have a right to be involved in the decision-making process.
2. Public participation includes the promise that the public’s contribution will influence the decision.
3. Public participation promotes sustainable decisions by recognizing and communicating the needs and interests of all participants, including decision-makers.
4. Public participation seeks out and facilitates the involvement of those potentially affected by or interested in a decision.
5. Public participation seeks input from participants in designing how they participate.
6. Public participation provides participants with the information they need to participate in a meaningful way.
7. Public participation communicates to participants how their input affected the decision.

component; it suggests that a plan involving the residents that is carefully considered will yield a substantive result that ensures that their needs are considered in the plan. Thus, it is not possible to avoid some normative view of the proper substance of a redevelopment plan when competing needs are so great. On the other hand, the appeal of strengthening the carefully considered plan is limited—the disadvantages to existing residents in the political process are still present. Yet, Professor Ann Carlson and Daniel Pollak's study has shown in the regulatory takings setting that the doctrine, even with its pro-government deferential standard, has impacted the way that local government officials make land use decisions.³³⁴ Similarly, it would probably take very little for the Supreme Court to impact eminent domain redevelopment decisionmaking by clarifying the standard for what a carefully considered plan by rights should look like.

The state of the planning literature today suggests that planning both is and is not the answer.³³⁵ The planning field is in flux. It has promised too much, and its practitioners and theorists are never politically placed to have a very significant role in actual planning. They have been either brought in as procedural facilitators or advocates, but not as part of imagining what will actually take place. Thus, just as the problem of redevelopment is complex, the solutions are equally complex. The role of the Supreme Court is to remedy the political process failure and not place a finger on the balance of a political process that is unduly weighted in favor of the types of redevelopment we see.³³⁶

We cannot assume that in this arena, however, the States are making the best decisions. The disaster of urban renewal proves as much. In addition, the Supreme Court cannot substitute its judgment for what is a good project. To the extent, however, that the Court conditions eminent domain on a carefully considered plan—the plan that is truly well-considered in fact, not just theory—can be easily infused with some broad but substantive teeth. Specifically, the Court could require that the plan endorse actual planning and inclusion in the process and the substance of the outcome. This point echoes the *Kelo* dissents trying to use public ownership or public access as the measure; instead, I focus on process because it allows greater flexibility and more directly acknowledges its political nature. The lessons of regulatory takings doctrine are that the Supreme Court should intervene in defining standards where there is political process failure due to unequal bargaining power. Conceptual severance

334. See Carlson & Pollak, *supra* note 16, at 116-17.

335. See Robert Fishman, *The Fifth Migration*, 71 J. AM. PLAN. ASS'N, 357, 358 (2005) (arguing that the United States is in the early stages of another great "migration" of population identified by Lewis Mumford in a classic 1925 article as largely shaping America).

336. Peter Marcuse, *The Politics of Public Space; The Right to the City: Social Justice and the Fight for Public Space*, 73.1 J. AM. PLANNING ASS'N 125 (2007) (reviewing both *THE POLITICS OF PUBLIC SPACE* (Setha Low & Neil Smith eds., 2006) and *DON MITCHELL, THE RIGHT TO THE CITY: SOCIAL JUSTICE AND THE FIGHT FOR PUBLIC SPACE* (2003)) ("Public space can be used to limit democracy as well as further it. And Harvey links the use of public space to discussions of the right to the city.").

allows the cognizance of different types of property owners—residential and commercial, owners and renters.

CONCLUSION

Not all property owners are wealthy and politically powerful. Not all of the poor are without political power or social capital. Nevertheless, it is the case that in the redevelopment context, the nature of the development imperatives, described at length above, work to the exclusion of the existing residents through privatized decision-making processes that ironically are used to justify the “publicness” of the redevelopment plan. The Supreme Court’s decision in *Kelo* is understandable for its reluctance to intervene in legislative decisionmaking about valid and invalid purposes. The decision has the inadvertent effect, however, of placing a hand on the balance of urban redevelopment, to the unacknowledged detriment of residents, property owners, and small business people. In light of the ever-increasing imperatives towards economic development from globalization—with cities viewing their interests as consistently aligned with national developers, corporations, and retailers—the consistent winners and losers in that redevelopment game should not be ignored. We cannot presume that because development is state-sponsored the interests of the public or of the residents of the proposed redevelopment will be appropriately considered. Both regulatory takings and critical race theory provide the language and the logic of anti-subordination provides a way to acknowledge the subordination. The Court has a responsibility to ensure that the eminent domain doctrine encourages a meaningful process and substantive standards that secures the interests of all who are present and subjected to a proposed redevelopment scheme.

NOTES

DIVIDED WE STAND, UNITED WE FALL: A PUBLIC POLICY ANALYSIS OF SANCTUARY CITIES' ROLE IN THE "ILLEGAL IMMIGRATION" DEBATE

CORRIE BILKE*

INTRODUCTION

"Give me your tired, your poor/Your huddled masses yearning to breathe free/The wretched refuse of your teeming shore/Send these, the homeless, tempest-tost to me"¹ This inscription located on the Statue of Liberty² is recognized as a symbol of freedom and hope for those immigrants arriving in the United States, the initial step taken to create a better life for themselves and their families in a nation recognized for its democratic freedom, personal liberties, and economic opportunities. However, once considered a nation of immigrants, America and the principles governing American society today are becoming increasingly anti-immigration in nature.³ National security concerns have dimmed the welcoming glow of Lady Liberty's torch, as policymakers take steps to erect a 700-mile wall along the U.S.-Mexico border and armed "vigilante-like Minutemen" stand guard to prevent individuals from crossing into the United States unlawfully.⁴

The power to regulate immigration is traditionally recognized as a power of the federal government.⁵ However, in the 9/11 Commission's report following

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1. EMMA LAZARUS, *The New Colossus* (1883), reprinted in EMMA LAZARUS: SELECTED POEMS 58, 58 (John Hollander ed., 2005).

2. See The Statue of Liberty-Ellis Island Foundation, http://www.statueofliberty.org/Statue_of_Liberty.html (last visited Feb. 7, 2009).

3. See Bill Wolpin, *Hide and Seek*, AM. CITY & COUNTY, Apr. 2007, at 6, 6. In 2006, 570 pieces of legislation were introduced in state legislatures that would limit undocumented migrants' "access to jobs, education or healthcare." *Id.*

4. Nancy Foner, Op-Ed, *Immigrants at Home*, N.Y. TIMES, Nov. 26, 2006, § 14, at 11.

5. See STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY 103-06 (4th ed. 2005) (referencing several possible sources of federal immigration power, including the

the terrorist attacks of September 11, 2001, the federal government summoned state and local authorities to aid in the enforcement of federal immigration law.⁶ Many state and local governments willingly accepted this call.⁷ Nonetheless, many other localities chose the opposite approach, adopting what are known as “sanctuary” or “non-cooperation” policies.⁸ Through local resolutions, departmental policies, executive orders, or city ordinances, these sanctuary cities generally “forbid local law enforcement personnel to ask about immigration status or report illegal aliens to federal authorities, except in the case of serious criminal offense.”⁹ This polarization among cities in the United States only intensifies the national immigration debate.

Rather than discussing whether state and local governments *can* (or cannot, in the case of sanctuary cities) enforce immigration law as a constitutional matter,¹⁰ this Note examines whether local governments *should*, from a public

Commerce Clause, the Migration or Importation Clause, and the Naturalization Clause of the United States Constitution).

6. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 390 (2004). (“There is a growing role for state and local law enforcement agencies [for the enforcement of immigration law]. They need more training and work with federal agencies so that they can cooperate more effectively with those federal authorities in identifying terrorist suspects.”).

7. Wolpin, *supra* note 3, at 6 (noting that in 2006, a total of “84 immigrant-related measures were signed into law in 27 states, twice the number passed one year earlier”). For a comprehensive database of state legislation related to immigration, see Migration Policy Institute, State Responses to Immigration: A Database of All State Legislation, http://www.migrationinformation.org/datahub/statelaws_home.cfm (last visited Feb. 20, 2009).

8. Laurel R. Boatright, Note, “*Clear Eye for the State Guy*”: Clarifying Authority and Trusting Federalism to Increase Nonfederal Assistance with Immigration Enforcement, 84 TEX. L. REV. 1633, 1635 (2006).

9. Amanda B. Carpenter, *Sanctuary Cities Protect Illegals, Threaten National Security*, HUMAN EVENTS, May 14, 2007, at 3.

10. For a constitutionally based discussion of sanctuary cities and the enforcement of federal immigration law by local and state government, see Boatright, *supra* note 8, at 1650-55; see generally Jorge L. Carro, *Municipal and State Sanctuary Declarations: Innocuous Symbolism or Improper Dictates?*, 16 PEPP. L. REV. 297, 316-24 (1989) (discussing possible “legal ramifications of these official imprimaturs of the sanctuary movement” including federal preemption and First Amendment implications); Kris W. Kobach, *The Quintessential Force Multiplier: The Inherent Authority of Local Police to Make Immigration Arrests*, 69 ALB. L. REV. 179 (2006); Matthew Parlow, *A Localist's Case for Decentralizing Immigration Policy*, 84 DENV. U.L. REV. 1061, 1067-69 (2007) (discussing an apparent circuit split that exists as to whether state and local governments have the authority to enforce federal immigration laws); Huyen Pham, *The Constitutional Right Not to Cooperate? Local Sovereignty and the Federal Immigration Power*, 74 U. CIN. L. REV. 1373 (2006); Cecilia Renn, *State and Local Enforcement of the Criminal Immigration Statutes and the Preemption Doctrine*, 41 U. MIAMI L. REV. 999 (1987); Daniel Booth, Note, *Federalism on ICE: State and Local Enforcement of Federal Immigration Law*, 29 HARV. J.L. & PUB. POL'Y 1063 (2006).

policy perspective, be involved in the enforcement of federal immigration law.

Part I discusses the underlying issues that form the roots of the United States' struggles with immigration, including the overwhelming presence of undocumented migrants, the effect that this presence has on the budgets of state and local governments, and the broken state of current federal immigration policy. Part II briefly discusses the existing legal limitations to state and local governments' authority to choose what role they will play in the enforcement of federal immigration law. Part III provides a profile of sanctuary cities in the United States, including their historical development. Part III also provides an overview of the potential hazards of nonfederal enforcement of immigration law that sanctuary policies seek to avert, as well as recent programs adopted by these localities to acclimate the undocumented migrant population into the larger community. Next, Part IV discusses recent Congressional proposals in the area of immigration, particularly Indiana Representative Dan Burton's "No Sanctuary for Illegals Act"¹¹ and the "Clear Law Enforcement for Criminal Alien Removal Act."¹² This Note concludes by arguing that public policy dictates that the Houses of Congress must work together with state and local government, considering all interests involved, in order to improve the current state of immigration policy.

I. PROFILE OF UNDOCUMENTED MIGRANTS IN 21ST CENTURY AMERICA AND THE BROKEN STATE OF THE IMMIGRATION SYSTEM

The Pew Hispanic Center recently published a report concluding that many U.S. citizens rank immigration as one of the most important problems currently facing the United States, falling immediately after the War in Iraq, energy and gas prices, and the general state of politics.¹³ Even the term "illegal immigration" sparks debate among immigration lawyers, legal scholars, and lawmakers alike.¹⁴

The issue of immigration lies at the forefront of public policy concerns.¹⁵ However, before an effective analysis of immigration policy may begin, it is important to start with a discussion of those issues that form the backdrop of the

11. H.R. 3549, 110th Cong. (2007).

12. H.R. 842, 110th Cong. (2007).

13. PEW HISPANIC CTR., THE STATE OF AMERICAN PUBLIC OPINION ON IMMIGRATION IN SPRING 2006: A REVIEW OF MAJOR SURVEYS 2 (May 17, 2006), *available at* <http://pewhispanic.org/files/factsheets/18.pdf> [hereinafter PEW HISPANIC CTR., THE STATE OF AMERICAN PUBLIC OPINION].

14. *See* LEGOMSKY, *supra* note 5, at 1192 (arguing that the "choice of terminology has [serious] social and political connotations"). This Note uses the term "undocumented migrant," as suggested by Professor Legomsky, when referring to "non-U.S. citizens who are present in the United States without valid documentation of lawful immigration status." *Id.* at 1193.

15. *See* PEW HISPANIC CTR., THE STATE OF AMERICAN PUBLIC OPINION, *supra* note 13, at 2. For further discussion related to American opinion on immigration, see generally THE PEW HISPANIC CTR., AMERICA'S IMMIGRATION QUANDARY: NO CONSENSUS ON IMMIGRATION PROBLEM OR PROPOSED FIXES (Mar. 30, 2006), *available at* <http://www.pewhispanic.org/files/reports/63.pdf>.

immigration debate, including the overwhelming presence of undocumented migrants, the effect that this presence has on the budgets of state and local governments, and the broken state of current federal enforcement efforts.

A. *The “Undocumented” Presence*

Researchers estimate that there are currently more than thirty-six million foreign-born individuals living in the United States, with as many as twelve million living here without valid immigration documentation.¹⁶ Using this estimate, undocumented migrants make up nearly 4% of the entire U.S. population.¹⁷ Of these twelve million undocumented persons, researchers estimate that up to one-half were initially admitted lawfully, “but overstayed or otherwise violated the terms of their authorization.”¹⁸

Researchers face many obstacles in their efforts to gather information on the undocumented migrant community. Factors contributing to the difficult task of calculating an accurate estimate of the size and demographics of the undocumented population include: “[T]he extent to which that population is undercounted in the census; rates of emigration and mortality; and whether

16. Parlow, *supra* note 10, at 1062; Wolpin, *supra* note 3, at 6. An immigrant will be considered unlawfully present within the United States under one of five set of circumstances:

(i) Present without inspection (PWI). Any alien who enters U.S. territory without presenting himself or herself to an immigration inspector at a designated point of entry is “PWI.”

(ii) Appearing for inspection at a point of entry without proper documents. Typically, this provision applies to persons who attempt to enter at U.S. land borders hoping that their documents will not be checked.

(iii) Appearing for inspection and making a material misrepresentation that makes the alien excludable. The misrepresentation could be made with false documents, false statements to the inspector, or presentation of a valid visa that was obtained by fraud.

(iv) Overstaying the time period authorized for a temporary period of stay after entering the country legally.

(v) Entering the United States legally, but becoming deportable for other violations of the terms of admission. Common grounds for deportability include unauthorized employment and conviction of an aggravated felony or a crime of moral turpitude.

Michael M. Hethmon, *The Chimera and the Cop: Local Enforcement of Federal Immigration Law*, 8 UDC/DCSL L. REV. 83, 98 (2004) (referencing various sections of Chapter 8 of the United States Code) (footnotes omitted).

17. Parlow, *supra* note 10, at 1062.

18. U.S. CONGRESSIONAL BUDGET OFFICE, THE IMPACT OF UNAUTHORIZED IMMIGRANTS ON THE BUDGETS OF STATE AND LOCAL GOVERNMENTS 4 (Dec. 2007), available at <http://www.cbo.gov/ftpdocs/87xx/doc8711/12-6-Immigration.pdf>.

immigrants who are in the United States in a quasi-legal capacity should be classified as unauthorized.”¹⁹

Recent studies provide a wealth of information about the undocumented migrant community living in the United States.²⁰ In 2005, the Pew Hispanic Center published a report outlining the size and demographics of the undocumented migrant population living in twenty-first century America.²¹ According to that report, migrants arriving from Mexico make up over half of the undocumented migrants currently living in the United States.²² Between 1995 and 2005, the number of undocumented migrants increased by an average of 700,000-800,000 annually.²³ This growth rate is roughly synonymous with those lawfully-present migrants arriving in the country.²⁴

However, some studies estimate that the number of undocumented migrants entering the United States over the past several years has declined.²⁵ Other estimates suggest that the rate of undocumented migration will continue to decrease in the future as well, not “because of civilian border patrols, laws being passed, [or] pronouncements by politicians,” but rather, because of the expansion of the Mexican economy and the promise for new job opportunities in Mexico during the coming years.²⁶

Approximately 60% of the estimated twelve million undocumented migrants are located within six states: California, Texas, Florida, Illinois, New York and New Jersey.²⁷ Large metropolitan areas within these states, such as Los Angeles,

19. *Id.* at 3 (defining “quasi-legal immigrants” as “those individuals whose legal authorization has expired but for whom renewals of or adjustments to status have not yet been finalized”).

20. For a comprehensive discussion about the demographical patterns of the undocumented migrant population living in the United States, see generally KARINA FORTUNY ET AL., THE URBAN INST., THE CHARACTERISTICS OF UNAUTHORIZED IMMIGRANTS IN CALIFORNIA, LOS ANGELES COUNTY, AND THE UNITED STATES (2007), available at http://www.urban.org/UploadedPDF/411425_Characteristics_Immigrants.pdf; ROBERTO SURO, DIRECTOR, PEW HISPANIC CTR., ATTITUDES ABOUT IMMIGRATION AND MAJOR DEMOGRAPHIC CHARACTERISTICS (Mar. 2, 2005), available at <http://www.pewhispanic.org/files/reports/41.pdf>.

21. JEFFREY S. PASSEL, PEW HISPANIC CTR., ESTIMATES OF THE SIZE AND CHARACTERISTICS OF THE UNDOCUMENTED POPULATION (Mar. 21, 2005), available at <http://www.pewhispanic.org/files/reports/44.pdf> [hereinafter PASSEL, ESTIMATES OF THE SIZE].

22. *Id.* at 2 (noting that in March 2004, Mexicans made up 57% of the undocumented migrant population; 24% originated from other Latin American countries; 9% were from Asia; 6% were from European nations and Canada; and 4% were from other miscellaneous countries).

23. *Id.*

24. *Id.*

25. See, e.g., Marla Dickerson, *U.S. Less Alluring to Illegal Migrants*, L.A. TIMES, Dec. 26, 2007, at 1 (noting a 20% drop in the number of individuals arrested while attempting to cross the United States-Mexico border during fiscal year 2007). “A drop in apprehensions is often interpreted as a sign that fewer migrants are attempting the trip.” *Id.*

26. Matthew Dowd, *The Mexican Evolution*, N.Y. TIMES, Aug. 1, 2005, at A15.

27. PASSEL, ESTIMATES OF THE SIZE, *supra* note 21, at 2 (noting the following concentration breakdown of undocumented migrant population in the United States using data compiled between

Houston, and New York City are currently recognized as sanctuary cities,²⁸ a factor likely contributing to the large undocumented presence within these states. However, this pattern is slowly changing as more undocumented migrants begin to settle in non-traditional areas, such as Arizona, North Carolina, and Tennessee.²⁹

The demographic data related to the undocumented migrant population is also worth noting. In 2004, men between the ages of eighteen and thirty-nine made up approximately 43% of the undocumented migrant population.³⁰ Women within the same age group accounted for nearly 30% of the total undocumented migrant population.³¹ A notable statistic is that children under the age of eighteen totaled 1.7 million, or approximately 17% of the total undocumented migrant population.³² These “[d]emographic characteristics are key factors in estimating the [undocumented] population’s fiscal impact on state and local governments.”³³

B. The “Cost” of the Undocumented Presence: The Impact of Undocumented Migrants on the Budgets of State and Local Governments

In December 2007, the Congressional Budget Office (CBO) published a paper discussing the impact of undocumented migrants on the budgets of state and local governments.³⁴ When considering the aggregate effect of unauthorized immigration at the state and local level, the CBO paper indicated that many studies show the cost of providing public services to this population exceeds what undocumented migrants pay in state and local taxes.³⁵ However, the report also stated that when taking into consideration total revenues and spending at the federal, state, and local levels *combined*, “tax revenues of all types generated by immigrants—both legal and unauthorized—exceed the cost of services they use.”³⁶ Furthermore, the CBO paper concluded that state and local spending on services provided specifically to the undocumented migrant population “makes up a small percentage of those governments’ total spending.”³⁷

The CBO identified several factors that may influence the discrepancy between the cost of services provided and the undocumented migrant population’s contribution in taxes. First, the extent to which undocumented

2002 and 2004: California (24%); Texas (14%); Florida (9%); New York (7%); Arizona (5%); Illinois (4%); New Jersey (4%); North Carolina (3%); and all other states (combined 32%)).

28. See *infra* note 125.

29. See PASSEL, ESTIMATES OF THE SIZE, *supra* note 21, at 2.

30. *Id.* at 10 (Fig. 8).

31. *Id.*

32. *Id.* at 3, 10 (Fig. 8).

33. U.S. CONGRESSIONAL BUDGET OFFICE, *supra* note 18, at 6.

34. *Id.* at 1.

35. *Id.*

36. *Id.*

37. *Id.*

migrants use certain public resources is a factor contributing to the added costs incurred by state and local governments.³⁸ For example, in the area of healthcare, studies suggest that many undocumented migrants are uninsured.³⁹ In 2004, the Pew Hispanic Center estimated that over half of undocumented migrants under the age of eighteen and nearly 60% of adult undocumented migrants were uninsured.⁴⁰ As such, these individuals tend to rely on public hospitals and emergency facilities when seeking medical treatment.⁴¹

Yet another relevant factor affecting immigration-related spending by state and local governments involves the circumstances giving rise to the amount of taxes the undocumented migrant population contributes to state and local governments.⁴² The issue does not rest solely on the argument that these individuals fail to comply with state and local tax laws. The CBO report noted that many researchers estimate up to 75% of undocumented migrants comply with federal, state and local tax laws.⁴³ In fact, the United States Social Security Administration estimated that undocumented migrants “contribute \$6-7 billion in Social Security funds that they will be unable to claim.”⁴⁴

Instead, the lack of tax contributions is directly related to the earning capacity of the undocumented migrant population.⁴⁵ The CBO cited to several studies conducted by the Pew Hispanic Center and the Urban Institute indicating that undocumented migrant workers tend to earn much less than their native-born counterparts and, consequently, a smaller portion of that income is subject to state and local taxes.⁴⁶ In 2004, for example, the Pew Hispanic Center estimated that “the average annual income for unauthorized families was \$27,400,

38. *Id.*

39. *Id.* at 2.

40. JEFFREY S. PASSEL, PEW HISPANIC CTR., UNAUTHORIZED MIGRANTS: NUMBERS AND CHARACTERISTICS 35 (June 14, 2005), *available at* <http://www.pewhispanic.org/files/reports/46.pdf> [hereinafter PASSEL, UNAUTHORIZED MIGRANTS].

41. U.S. CONGRESSIONAL BUDGET OFFICE, *supra* note 18, at 1-2.

42. *Id.* at 2.

43. *Id.* at 6.

44. RANDY CAPPS & MICHAEL FIX, THE URBAN INST., UNDOCUMENTED IMMIGRANTS: MYTHS AND REALITIES 1 (Oct. 25, 2005), *available at* http://www.urban.org/UploadedPDF/900898_undocumented_immigrants.pdf.

45. U.S. CONGRESSIONAL BUDGET OFFICE, *supra* note 18, at 2 (noting that the average household income of the undocumented migrant is “significantly less than that of both legal [migrants] and native-born citizens”). For further discussion related to the effect of immigration on the American workforce, see generally RAKESH KOCHHAR, PEW HISPANIC CTR., GROWTH IN THE FOREIGN-BORN WORKFORCE AND EMPLOYMENT OF THE NATIVE BORN (Aug. 10, 2006), *available at* <http://www.pewhispanic.org/files/reports/69.pdf>. For a discussion from the perspective of the immigrant community, see generally RAKESH KOCHHAR, PEW HISPANIC CTR., SURVEY OF MEXICAN MIGRANTS: THE ECONOMIC TRANSITION TO AMERICA (Dec. 6, 2005), *available at* <http://www.pewhispanic.org/files/reports/58.pdf> (providing information obtained during survey of Mexican migrants arriving in the United States).

46. U.S. CONGRESSIONAL BUDGET OFFICE, *supra* note 18, at 2.

compared with \$47,800 for legal immigrant families and \$47,700 for native-born families.”⁴⁷ The CBO also noted that as a result of undocumented migrants’ lower earning capacity, these individuals have “less disposable income to spend on purchases subject to sales or use taxes”; revenues of which “[s]tate and local governments typically rely more heavily on” than those revenues generated from taxes based on income.⁴⁸ The CBO report also discussed in detail the effect of undocumented migrants on state and local government spending in the three primary areas of public services: education, health care, and law enforcement.⁴⁹

1. *Education*.—The CBO credited education costs as the “largest single expenditure in state and local budgets.”⁵⁰ Pursuant to the landmark case of *Plyler v. Doe*,⁵¹ “state and local governments bear the primary fiscal and administrative responsibility of providing schooling” for the nearly two million undocumented migrant children currently living in the United States.⁵² Public efforts to educate these children, however, can be a costly endeavor. For example, the costs of educating those children who do not speak English fluently can be between 20% and 40% higher than that of educating native-born, English-speaking children.⁵³ In 2000, 1.5% of all children enrolled in kindergarten through the fifth grade, and 3% of children enrolled in the sixth through the twelfth grade, were undocumented.⁵⁴

2. *Health Care*.—Publicly funded healthcare facilities must provide medical assistance to all individuals, “regardless of their ability to pay for such medical services or their immigration status.”⁵⁵ According to the CBO, “[t]he amount of uncompensated care provided by some state and local governments is growing because an increasing number of [undocumented migrants] are using those services,” many of whom fail to have proper health insurance.⁵⁶ For example, in areas along the U.S.-Mexico border, state and local governments incurred nearly \$190 million in healthcare costs in 2000 as a result of providing uncompensated medical care to undocumented migrants.⁵⁷ This multi-million dollar deficit is hardly a national trend, however, as these uncompensated healthcare costs represent only a small percentage of total spending for most state and local governments away from the U.S.-Mexico border.⁵⁸ In Oklahoma, for example,

47. *Id.* (citing PASSEL, UNAUTHORIZED MIGRANTS, *supra* note 40).

48. *Id.*

49. *See id.* at 1, 7-12.

50. *Id.* at 7.

51. 457 U.S. 202 (1982) (holding that children could not be denied access to a public education as a result of their immigration status).

52. U.S. CONGRESSIONAL BUDGET OFFICE, *supra* note 18, at 7 (citing *Plyler*, 457 U.S. 202).

53. *Id.* at 2.

54. CAPPS & FIX, *supra* note 44, at 1.

55. U.S. CONGRESSIONAL BUDGET OFFICE, *supra* note 18, at 8.

56. *Id.*

57. *Id.* This figure represents nearly one quarter of the uncompensated healthcare costs incurred by these state and local governments during this time. *Id.*

58. *Id.*

“the services provided to [undocumented migrants] have accounted for less than [1%] of the total individuals served and cost less than [1%] of the total dollars spent for Medicaid services.”⁵⁹

3. *Law Enforcement.*—Those undocumented migrants who are accused or convicted of violating state and local criminal codes are not subject to immediate deportation.⁶⁰ Instead, these individuals must pass “through the local criminal justice system in the same fashion that any other suspect would.”⁶¹ During this time, state and local governments incur the costs of this process, including the investigation, detention, prosecution, and incarceration of those individuals accused of criminal activity.⁶²

The CBO concluded that immigrants, taken as a whole, are less likely to be subject to incarceration than native-born citizens.⁶³ Researchers have yet to pinpoint the exact reason for this phenomenon.⁶⁴ However, areas along the U.S.-Mexico border appear to incur greater costs related to law enforcement activities involving undocumented migrants.⁶⁵ In 1999, for example, local governments in California, Arizona, New Mexico, and Texas that are on the U.S.-Mexico border incurred more than \$108 million in total law enforcement expenditures.⁶⁶

In its calculations, the CBO report failed to consider the added costs that state and local governments would incur if responsible for immigration enforcement within their communities. The necessary funds associated with additional personnel and training programs would presumably create further financial burden on the already strained budgets of state and local governments.

4. *Federal Assistance.*—The CBO identified several federal programs established to “assist state and local governments in funding the additional costs associated with providing services to [undocumented migrants].”⁶⁷ “Those

59. *Id.* at 9.

60. *Id.* Unless such crimes are “immigration related” offenses. *Id.*

61. *Id.* For a summary of the number of undocumented migrants entering the criminal justice system during the mid-1990’s, and the types of offenses for which they were convicted, see generally REBECCA L. CLARK & SCOTT A. ANDERSON, *THE URBAN INST., ILLEGAL ALIENS IN FEDERAL, STATE AND LOCAL CRIMINAL JUSTICE SYSTEMS* (2000), available at http://www.urban.org/UploadedPDF/410366_alien_justice_sum.pdf.

62. U.S. CONGRESSIONAL BUDGET OFFICE, *supra* note 18, at 9 (“The federal government may take custody of those who are convicted after they have completed their sentences and then begin the deportation process, but until that point, state and local governments bear the cost . . .”).

63. *Id.*

64. For further discussion on incarceration rates of immigrants versus native-born citizens, see generally Kristin F. Butcher & Anne Morrison Piehl, *Why Are Immigrants’ Incarceration Rates So Low? Evidence on Selective Immigration, Deterrence, and Deportation* (Fed. Res. Bank of Chi., Working Paper No. 2005-19, 2005), available at www.chicagofed.org/publications/workingpapers/wp2005_19.pdf.

65. U.S. CONGRESSIONAL BUDGET OFFICE, *supra* note 18, at 9.

66. *Id.*

67. *Id.* at 10 (discussing the No Child Left Behind Act of 2001, Medicaid, and the Immigration Reform and Control Act of 1986).

programs, however, do not offset the full costs of providing those services” related to education, healthcare, and law enforcement incurred by state and local governments.⁶⁸ Consequently, state and local governments are left to bear much of the weight that is created as a result of the United States’ broken federal immigration policy.

C. The Broken State of the Immigration System

Immigration lawyers, scholars, and lawmakers alike would likely agree that the current state of immigration law and policy in the United States is broken. Aside from the large number of individuals evading immigration enforcement efforts and entering or remaining in this country without proper immigration documentation,⁶⁹ additional concerns exist related to the lack of federal enforcement resources. As the debate surrounding federal immigration policy continues, it remains clear that “the muddled status quo cannot hold.”⁷⁰

1. *Excessive Number Disparity Faced by Federal Law Enforcement.*—The power to regulate immigration is traditionally recognized as being vested in the federal government.⁷¹ The U.S. Bureau of Immigration and Customs Enforcement (ICE) is the agency formally responsible for enforcing the United States’ federal immigration laws, which includes the responsibility for the removal of those individuals unlawfully present.⁷² Effective enforcement over these twelve million undocumented migrants faces a huge number disparity, however, as there are currently only two-thousand ICE employees working solely as enforcement officers.⁷³ Recent studies estimate that the current number of individuals living unlawfully in the United States “outweighs the number of federal agents whose job it is to find them within our borders by 5,000 to 1.”⁷⁴

2. *Lack of Resources During Subsequent Legal Proceedings.*—Defects in the current federal immigration system result not only from a lack of personnel resources during the detection and apprehension phase of immigration enforcement, but also from a lack of appropriate resources during the subsequent legal proceedings. There is a lengthy delay in the Department of Homeland Security’s deportation proceedings as courts continue to be hindered with huge

68. *Id.*

69. See *supra* text accompanying note 16.

70. Boatright, *supra* note 8, at 1674.

71. LEGOMSKY, *supra* note 5, at 103-06 (referencing possible sources of federal immigration power, including the Commerce Clause, the Migration or Importation Clause, and the Naturalization Clause of the United States Constitution).

72. See 6 U.S.C. § 252(a)(1) (2006) (establishing the “Bureau of Border Security”). Homeland Security, pursuant to 6 U.S.C. §§ 452, 542(b)&(c), later changed this Bureau to ICE. See 3 C.J.S. *Aliens* § 199 (2003); see also U.S. Immigration and Customs Enforcement, <http://www.ice.gov/about/index.htm> (last visited Feb. 3, 2009).

73. Parlow, *supra* note 10, at 1062-63 (noting that also ICE currently has more than 17,000 total employees).

74. Booth, *supra* note 10, at 1066 (quoting 151 CONG. REC. S7853 (daily ed. June 30, 2005)).

caseloads.⁷⁵ According to the *U.S. Immigration and Customs Enforcement Annual Report for Fiscal Year 2006*, “[i]n immigration courtrooms, ICE attorneys prepare about 1,430 cases, create 683 new case records, create 562 new document records and obtain 528 final removal orders” on a daily basis.⁷⁶ Likewise, the Department of Homeland Security lacks appropriate funding and personnel to properly detain those individuals deemed deportable or removable.⁷⁷ Researchers estimate that the Department of Homeland Security has only 20,000 detention “beds” available for its detainees, while the number of undocumented migrants runs into the millions.⁷⁸ As a result of this shortage, federal authorities historically have declined to take custody of undocumented migrants arrested by local officials.⁷⁹

In addition, the physical removal of individuals deemed “deportable” can turn into a costly endeavor for federal immigration authorities.⁸⁰ Michael Hethmon, a staff attorney for the Federation for American Immigration Reform (FAIR), noted that most aliens are unable to afford transportation back to their home country once the courts deem them deportable.⁸¹ As such, the government is forced to cover the expenses of purchasing a one-way airline ticket back to the alien’s home country.⁸² Furthermore, many airline companies refuse to board deported individuals, unless they are escorted by at least one federal immigration officer; thereby increasing any transportation and lodging costs associated with the seemingly simple act of physically removing the alien from the United States.⁸³

II. LEGAL LIMITATIONS TO STATE AND LOCAL GOVERNMENTS’ ABILITY TO CHOOSE THEIR ROLE IN IMMIGRATION ENFORCEMENT

A. 8 U.S.C. §§ 1373 and 1644

The emphasis toward state and local assistance in immigration enforcement began years before the September 11, 2001, terrorist attacks. In 1996, Congress passed into law two statutes that limit state and local governments’ ability to

75. Honorable Rachel L. Brand, Assistant Attorney General for Legal Policy, U.S. Dep’t of Justice, Panel Discussion at the George Mason University Civil Rights Law Journal Symposium: Immigration—Practice and Policy Fall 2006 (Oct. 18, 2006), in 17 GEO. MASON U. CIV. RTS. L.J. 545, 550 (2007).

76. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE FISCAL YEAR 2006 ANNUAL REPORT, at ix (2007), available at <http://www.ice.gov/doclib/about/ICE-06AR.pdf> [hereinafter U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE].

77. See Hethmon, *supra* note 16, at 132.

78. See *id.*

79. See Boatright, *supra* note 8, at 1635.

80. See Hethmon, *supra* note 16, at 134.

81. *Id.*

82. *Id.*

83. *Id.*

freely choose what role they will play in the enforcement of federal immigration law. The first statute, 8 U.S.C. § 1373, states in pertinent part:

Notwithstanding any other provision of Federal, State, or local law, a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.⁸⁴

Similarly, 8 U.S.C. § 1644 states:

Notwithstanding any other provision of Federal, State, or local law, no State or local government entity may be prohibited, or in any way restricted, from sending to or receiving from the Immigration and Naturalization Service information regarding the immigrant status, lawful or unlawful, of an alien in the United States.⁸⁵

These statutes specifically prohibit government agencies at any level from preventing their employees from voluntarily conveying information regarding another individual's immigration status to federal authorities.⁸⁶ Interestingly, sanctuary policies appear to run afoul of these federal statutes, yet continue to exist today virtually unchallenged.⁸⁷ So long as government agencies do not retaliate against or punish employees who communicate with federal immigration authorities, no violation of the above-mentioned statutes appears to exist by the mere preserve of a written sanctuary policy. The debate regarding these sanctuary policies, however, rests on the argument that these policies are violations of federal law that are just not enforced.

In *City of New York v. United States*,⁸⁸ New York City, a self-identified sanctuary since 1989,⁸⁹ challenged the constitutionality of 8 U.S.C. § 1373 and 8 U.S.C. § 1644.⁹⁰ The City argued, among other things, that these sections of the U.S. Code violated the Tenth Amendment of the Constitution⁹¹ "because they directly forbid state and local government entities from controlling the use of information regarding the immigration status of individuals obtained in the

84. 8 U.S.C. § 1373(a) (2006).

85. *Id.* § 1644.

86. See María Pabón López, *The Phoenix Rises from El Cenizo: A Community Creates and Affirms a Latino/A Border Cultural Citizenship Through its Language and Safe Haven Ordinances*, 78 DENV. U. L. REV. 1017, 1039 (2001).

87. See, e.g., *id.* at 1039-40 (discussing the Safe Haven Ordinance).

88. 179 F.3d 29 (2d Cir. 1999).

89. See *id.* at 31 (noting that New York City's sanctuary policy was issued in the form of Executive Order No. 124 in August 1989 by then mayor, Edward Koch).

90. *Id.* at 33.

91. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

course of their official [duties].”⁹² Upon review of the district court’s dismissal of the complaint,⁹³ the U.S. Court of Appeals for the Second Circuit upheld the constitutionality of §§ 1373 and 1644 because “Congress ha[d] not compelled state and local governments to enact or administer any federal regulatory program.”⁹⁴ Despite its loss in this constitutional challenge, New York City is still formally recognized as a sanctuary city.⁹⁵

More recently, the Department of Justice (DOJ) implemented a new policy that would further restrict state and local governments’ chosen role in federal immigration enforcement.⁹⁶ Beginning in 2001, the DOJ began to include immigration warrants in a national database traditionally reserved for wanted felons.⁹⁷ Police officers customarily query this national database during any routine stop.⁹⁸ Departmental policy requires that officers arrest individuals if the query shows that there is a warrant out for the individual’s arrest.⁹⁹ Through this policy, police officers are inadvertently enforcing federal immigration law through the course of their day-to-day duties.

Concerns arise, however, from studies suggesting that the information contained in this database is inaccurate.¹⁰⁰ According to the Migration Policy Institute, information entered into this national database between 2002 and 2004 contained an error rate of 42%.¹⁰¹ Furthermore, additional issues exist “when addressing state and local law enforcement’s access to immigration databases” such as this.¹⁰² For example, “how can the quality of the database be improved to avoid potential problems such as ‘false positives’ and individuals with similar names.”¹⁰³

92. *City of New York*, 179 F.3d at 33.

93. *City of New York v. United States*, 971 F. Supp. 789, 799 (S.D.N.Y. 1997), *aff’d*, 179 F.3d 29 (2d Cir. 1999).

94. *City of New York*, 179 F.3d at 35 (noting also that “[t]hese Sections do not directly compel states or localities to require or prohibit anything. Rather, they prohibit state and local governmental entities or officials only from directly restricting the voluntary exchange of immigration information with the [federal authorities].”).

95. See *infra* note 125 and accompanying text.

96. See Ben Arnoldy, “Sanctuary” Cities for Illegals Draw Ire, CHRISTIAN SCI. MONITOR, Sept. 25, 2007, at 3.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* (discussing the Migration Policy Institute’s Study).

101. *Id.*

102. CONG. RESEARCH SERV., ENFORCING IMMIGRATION LAW: THE ROLE OF STATE AND LOCAL LAW ENFORCEMENT 32 (Aug. 14, 2006), available at <http://www.ilw.com/immigdaily/news/2006,0912-crs.pdf>.

103. *Id.*

B. Recent Legal Action Related to Sanctuary Policies

In *City of New York v. United States*, New York City's sanctuary policy was not the basis of the legal challenge; rather, New York City challenged provisions of the United States Code that limited the City's ability to choose its role in federal immigration enforcement efforts.¹⁰⁴ To date, *no* party has brought a constitutional challenge regarding the validity of any specific sanctuary ordinance or order.

Most recently, Judicial Watch, a public interest group that advocates the investigation and prosecution of government corruption,¹⁰⁵ brought open records lawsuits against police departments in Washington, D.C.; Chicago, Illinois; and Los Angeles, California.¹⁰⁶ Judicial Watch also conducted investigations into similar policies of police departments in Houston, Texas, and Westchester, New York.¹⁰⁷ In its most recent litigation, the organization sought judicial orders to compel local police departments to proffer documents related to their sanctuary policies, many of which remained undisclosed to the public.¹⁰⁸ What exactly Judicial Watch is looking to gain from the production of these documents is unclear. The organization believes that access to these documents advances one of its core missions: "[T]o promote transparency, integrity, and accountability in government and fidelity to the rule of law."¹⁰⁹ Information provided on Judicial Watch's website indicates that these lawsuits are still ongoing.¹¹⁰

To date, neither Congress nor the Court has clearly explained the precise role states are to play in the enforcement of federal immigration law.¹¹¹ As a result, state and local governments are ultimately left to choose their own individual immigration policy. The reality is that "[c]ity councils can[not] change the federal government's failed immigration policies, but they can choose whether to offset or intensify the damage."¹¹² This lack of consistency in the enforcement of federal immigration law among state and local governments creates a

104. *City of New York v. United States*, 179 F.3d 29, 33 (2d Cir. 1999).

105. Judicial Watch, About Us, <https://www.judicialwatch.org/about.shtml> (last visited Feb. 5, 2009).

106. See Judicial Watch, *Judicial Watch Files Open Records Lawsuit Against Washington, D.C. Police Department over Illegal Immigration Policies*, Mar. 12, 2007, <http://www.judicialwatch.org/6205.shtml>.

107. *Id.*

108. *Id.*

109. Judicial Watch, Litigation, <http://www.judicialwatch.org/litigation> (last visited Feb. 5, 2009).

110. *Id.* (noting that immigration enforcement is "currently [being] litigated").

111. The City of New York filed a petition for certiorari following its loss in *City of New York v. United States*; however, the U.S. Supreme Court subsequently rejected such petition. *City of New York v. United States*, 528 U.S. 1115 (2000). No party has brought a similar challenge since that time.

112. Michele Wucker, Op-Ed., *A Safe Haven in New Haven*, N.Y. TIMES, Apr. 15, 2007, § 14, at 15.

patchwork “quilt of local immigration policies,”¹¹³ and only fans the fires of the existing immigration debate. In order to extinguish these concerns, it is important that Congress issue precise guidelines as to the proper role of state and local governments in the enforcement of federal immigration law.¹¹⁴

The issue of state and local involvement is ultimately left in the hands of Congress to decide and outline. As the raging debate surrounding immigration continues, Congress should finally define in clear and unequivocal terms the proper role, if any, of state and local governments in the enforcement of federal immigration law.

III. PROFILE OF SANCTUARY CITIES IN THE UNITED STATES

A. *Historical Development: Past and Present*

In the United States, the concept of “sanctuary” is hardly a recent development. During the 1980s, religious organizations across the country provided sanctuary for undocumented Central American refugees fleeing the political turmoil occurring in their home countries.¹¹⁵ This initial sanctuary movement was a response to the federal Immigration and Naturalization Service’s denial of the majority of refugee applications filed during this time despite the passage of the Refugee Act of 1980.¹¹⁶

During the mid-1980s, the sanctuary movement crossed into the public sector, as the cities of Berkeley, California; St. Paul, Minnesota; Madison, Wisconsin; and Cambridge, Massachusetts, among others, passed local resolutions to serve as sanctuaries for Central American refugees.¹¹⁷ It is from these historical roots that the modern sanctuary movement has evolved, expanding its protection from Central American refugees to all foreign-born

113. Kevin Johnson, *Report for Local Police Explains Immigration Issues*, USA TODAY, July 25, 2007, at 5A.

114. See Linda Reyna Yanez & Alfonso Soto, *Local Police Involvement in the Enforcement of Immigration Law*, 1 HISP. L.J. 9, 50 (1994) (“If the states are to be preempted, Congress needs to indicate this stance in clear and unequivocal terms. If state participation is to be encouraged, Congress should issue clear and authoritative guidelines to promote uniform application . . .”).

115. See John M. Gannon, Note, *Sanctuary: Constitutional Arguments for Protecting Undocumented Refugees*, 20 SUFFOLK U. L. REV. 949, 954-56 (1986) (noting that many sanctuary advocates were prosecuted during this time for harboring and transporting these undocumented refugees). For additional legal analysis of this initial sanctuary movement made in light of the arrival of Central American refugees, see Paul Wickham Schmidt, *Refuge in the United States: The Sanctuary Movement Should Use the Legal System*, 15 HOFSTRA L. REV. 79 (1986).

116. See Ignatius Bau, *Cities of Refuge: No Federal Preemption of Ordinances Restricting Local Government Cooperation with the INS*, 7 LARAZAL.J. 50, 50-51 (1994) (noting that between 1983 and 1991, the INS denied 97% of Salvadoran and 98% of Guatemalan applications for asylum).

117. See *id.* at 51-52. Many of these areas continue to be recognized as immigration sanctuaries to this day. See *infra* note 125 and accompanying text.

individuals.

Through local resolutions, departmental policies, executive orders, or city ordinances, these sanctuary policies generally “forbid local law enforcement personnel to ask about immigration status or report illegal aliens to federal authorities, except in the cases of serious criminal offense.”¹¹⁸ The substantive provisions of sanctuary policies are categorized as: “[(1)] no discrimination based on [immigration] status; [(2)] no enforcement of [federal] immigration laws; [(3)] no enforcement of civil [federal] immigration laws; [(4)] no inquiry about [immigration] status; and [(5)] no notification of [federal] immigration authorities.”¹¹⁹

Confusion still exists, however, as to the extent of protection these local governments offer to undocumented migrants.¹²⁰ These local governments appear to merely take a passive approach to federal immigration enforcement with the “don’t ask, don’t tell” policies that they implement.¹²¹ There are no reported instances of local law enforcement personnel physically interfering with the efforts of federal immigration enforcement officers.¹²² However, those who oppose these sanctuary policies argue that this passivity is just as dangerous as proactive resistance, which is where the heart of the debate lies.¹²³

In 2007, researchers identified as many as seventy cities, counties and state governments that have sanctuary-like policies in place.¹²⁴ In 2006, however, the Congressional Research Service (CRS) reported only thirty-two different cities, and counties that are formally recognized as immigration “sanctuaries.”¹²⁵ The

118. Carpenter, *supra* note 9, at 3.

119. Pham, *supra* note 10, at 1389.

120. See, e.g., Arnoldy, *supra* note 96, at 2 (referencing a comment made by Michael Chertoff, Former Secretary of Homeland Security, who said, “People use the term ‘sanctuary city’ in different ways, so I’m never quite sure what people mean.”).

121. *Id.*

122. *Id.*

123. See Hethmon, *supra* note 16, at 85 (“To turn an official blind eye to violations of federal immigration law in such circumstances is not an exercise of state sovereignty, but rather impermissible passive resistance to federal law.”).

124. See Arnoldy, *supra* note 96, at 2 (discussing the court by the National Immigration Law Center).

125. CONG. RESEARCH SERV., *supra* note 102, at 26 n.85. The cities enumerated in the report include: Anchorage, Alaska; Fairbanks, Alaska; Chandler, Arizona; Fresno, California; Los Angeles, California; San Diego, California; San Francisco, California; Sonoma County, California; Evanston, Illinois; Cicero, Illinois; Cambridge, Massachusetts; Orleans, Massachusetts; Portland, Maine; Baltimore, Maryland; Takoma Park, Maryland; Ann Arbor, Michigan; Detroit, Michigan; Minneapolis, Minnesota; Durham, North Carolina; Albuquerque, New Mexico; Aztec, New Mexico; Rio Arriba County, New Mexico; Santa Fe, New Mexico; New York, New York; Ashland, Oregon; Gaston, Oregon; Marion County, Oregon; Austin, Texas; Houston, Texas; Katy, Texas; Seattle, Washington; and Madison, Wisconsin. *Id.* FIRM provides a number of examples of local pro-immigration resolutions on its website. FIRM, <http://www.fairimmigration.org/learn/immigration-reform-and-immigrants> (last visited Feb. 5, 2009).

most notable locality not listed within the CRS report that is currently recognized as a self-identified immigration sanctuary is Washington, D.C.¹²⁶

Police departments in San Diego, California; Chandler, Arizona; and Philadelphia, Pennsylvania, adopted similar non-cooperation policies in regards to federal immigration law.¹²⁷ David Cohen, spokesperson for the San Diego Police Department (SDPD), argued in support of SDPD's policy: "'We've spent decades establishing trust . . . with our very diverse immigrant communities. If there is an immigration emergency tied to criminal activity, of course we'll assist. But if it is simply an immigration violation . . . we will not be involved.'"¹²⁸

The Chandler, Arizona, Police Department's non-cooperation policy similarly prohibits the Department's Officers from arresting an individual whose only violation is immigration-related.¹²⁹ Additionally, the Chandler policy "prohibits [the] police from notifying the [federal authorities] of undocumented persons when those persons are material witnesses of crime, are seeking medical treatment, or are involved in family disturbances, minor traffic offenses, or minor misdemeanors."¹³⁰

The passage of sanctuary policies is a growing trend in the United States.¹³¹ The sanctuary policies discussed thus far were all at the department, city, and county level.¹³² Worth noting, however, is the fact that both Alaska and Oregon have adopted *statewide* sanctuary policies forbidding state agencies from using government resources to aid in the enforcement of federal immigration law.¹³³

126. See Carpenter, *supra* note 9, at 3. In 2007, the Washington, D.C., Police Department published a public memorandum in which Police Chief Charles H. Ramsey stated,

MPD [Metropolitan Police Department] officers are strictly prohibited from making inquiries into citizenship or residency status for the purpose of determining whether an individual has violated the civil immigration laws or for the purpose of enforcing those laws . . . the MPD is not in the business of inquiring about the residency status of the people we serve and is not in the business of enforcing civil immigration laws.

Id.

127. See Rebecca Smith et al., *Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 28 N.Y.U. REV. L. & SOC. CHANGE 597, 629 (2004).

128. *Id.* (quoting Kris Axtman, *Police Can Now Be Drafted to Enforce Immigration Law*, CHRISTIAN SCI. MONITOR, Aug. 19, 2002, at 2).

129. See *id.*

130. *Id.*

131. See Wolpin, *supra* note 3, at 6 (reporting that sanctuary policies have been adopted by over forty localities in the United States as of April 2007).

132. See generally NATIONAL IMMIGRATION LAW CENTER, LAWS, RESOLUTIONS AND POLICIES INSTITUTED ACROSS THE U.S. LIMITING ENFORCEMENT OF IMMIGRATION LAWS BY STATE AND LOCAL AUTHORITIES (Dec. 2008), available at <http://www.nilc.org/immlawpolicy/LocalLaw/localaw-limiting-tbl-2008-12-03.pdf> (listing all local and state laws and showing that only two states—Alaska and Oregon—have adopted statewide policies).

133. *Id.* at 1, 16 (referencing Alaska's House Joint Resolution 22, passed in 2003 and Oregon's Statute 181.850, passed in 2001).

B. Potential Hazards of Nonfederal Immigration Enforcement that Sanctuary Policies Seek to Avert

The use of the 800,000 state and local police officers¹³⁴ working in the United States today to aid in immigration enforcement seems to be a simple solution to a very complicated problem. The significance that this additional manpower would have in the enforcement of immigration violations is undeniable. However, the negative collateral consequences associated with this seemingly simple solution are equally difficult to dismiss.¹³⁵

Those government agencies with sanctuary policies in place proffer several reasons for their decision to adopt such a policy. The potential hazards that may result from using state and local resources in the enforcement of federal immigration law are both economical and practical in nature.¹³⁶

1. *Lack of Resources at the State and Local Level.*—First, localities are concerned that expending local law enforcement resources for federal immigration purposes would leave fewer resources for typical, day-to-day functions of local law enforcement.¹³⁷ The concern is that if police officers spend significant amounts of time investigating the immigration status of local residents, core duties such as general public safety assurance and order maintenance will be neglected. Detroit City Council President Ken Cockrel, Jr. argues, “I want Detroit police officers out there catching people who are stealing cars and mugging old ladies, not asking people for their passports.”¹³⁸

Also, concerns arise that programs that solicit the aid of local law enforcement may not provide the financial resources necessary to fund such efforts.¹³⁹ As a result, any such program would create an unfunded federal mandate, leaving open many questions as to where necessary funding would come from, if not from the federal government, to subsidize the immigration enforcement duties now expected from local agencies.¹⁴⁰

2. *Local Enforcement Undermines Community Policing Efforts.*—Furthermore, supporters of sanctuary policies argue that mandating local law

134. See Kobach, *supra* note 10, at 183.

135. See generally Carrie L. Arnold, Note, *Racial Profiling in Immigration Enforcement: State and Local Agreements to Enforce Federal Immigration Law*, 49 ARIZ. L. REV. 113 (2007) (describing the negative effects state and local enforcement of federal immigration law may have on community policing efforts, as well as the potential for increased incidences of racial profiling).

136. See Wucker, *supra* note 112 (describing some of the costs associated with the “crackdown” on undocumented migrant population, including: “high legal fees, damage to local businesses, scarce police resources wasted, the negative impact on public safety of keeping undocumented immigrants underground and the social division”).

137. See Booth, *supra* note 10, at 1066.

138. Emily Bazar, *Lawmakers Seek “Sanctuary Cities” Crackdown*, USA TODAY, Oct. 25, 2007, at 3A.

139. See Orde F. Kittrie, *Federalism, Deportation, and Crime Victims Afraid to Call the Police*, 91 IOWA L. REV. 1449, 1477 (2006).

140. See *id.*

enforcement agencies to enforce federal immigration law will lead to the deterioration of bonds with the alien community that took much time and effort to establish.¹⁴¹ The concern is that if state and local police are involved in the enforcement of federal immigration law, undocumented migrants who are either victims or witnesses of criminal activity may hesitate to contact police out of fear that they will be deported.¹⁴² In the current era of “community policing,” with enhanced focus on community relations, it is understandable why agencies are hesitant to take any action that may jeopardize the relationships they worked so hard to create and maintain.¹⁴³ Joan Friedland of the National Immigration Law Center argues, “[i]f people fear the police at every turn, that undermines community policing, which undermines community safety.”¹⁴⁴ Sanctuary policies are a strong illustration of the value that state and local police agencies place on these local relationships.¹⁴⁵ Lynn Tramonte of the National Immigration Forum argues, “What’s going on now is not really a sanctuary movement It’s a modern community-policing strategy.”¹⁴⁶

Advocates of sanctuary policies also argue that if undocumented migrants who are victims of crime are afraid to come forward, the entire community will suffer the effects.¹⁴⁷ New York City Mayor Michael Bloomberg explains:

“[W]e all suffer when an immigrant is afraid to tell the police As good as they are, our police officers cannot stop a criminal when they are not aware of his crimes, which leaves him free to do it again to anyone he chooses. Which means that all of us lose.”¹⁴⁸

3. *State Autonomy Based on Ideals of Federalism.*—Likewise, ideals of federalism suggest that local governments should be given the authority to deal with local issues as they see fit, without the threat of federal interference. “[L]ocal governments are more in touch with their constituents and are thus able to be more responsive to the needs of their communities – whether friendly or

141. See Booth, *supra* note 10, at 1066-67 (“[R]equiring state and local officials to enforce immigration laws may actually destroy the relationships that these officials have with the aliens in their communities, thus making it less likely that illegal aliens, fearing deportation, will come forward with information about crimes.”).

142. Arnold, *supra* note 135, at 122.

143. See Arnoldy, *supra* note 96, at 2.

144. Bazar, *supra* note 138.

145. See Bau, *supra* note 116, at 71 (“State and local officials must decide whether such cooperation is more important than any actual or perceived cooperation between those local governments and the [federal authorities]. The answer to that public policy question will determine the future of local noncooperation ordinances.”).

146. Arnoldy, *supra* note 96, at 2.

147. Kittrie, *supra* note 139, at 1454.

148. *Id.* (quoting Press Release, Mayor’s Office of Immigrant Affairs, Mayor Michael R. Bloomberg Signs Executive Order 41 Regarding City Services for Immigrants (Sept. 17, 2003), available at <http://www.nyc.gov/cgi-bin/misc/pfprinter.cgi?action=print&sitename=OM>).

hostile to undocumented [migrants].”¹⁴⁹ Justice Brandeis once said, “It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”¹⁵⁰ State and local governments serve as laboratory settings for a number of social issues, including firearm regulation, homosexual rights, and campaign finance reform.¹⁵¹ The issue of immigration at the state and local level creates yet another opportunity for social experimentation, and hopefully, will result in inspiration for reform that balances the “often competing policy concerns of community policing . . . and national security.”¹⁵²

4. *Lack of Training Resources and Potential for Civil Rights Violations.*— Finally, sanctuary advocates maintain that immigration law is one of the most complex areas of federal law, making immigration enforcement and verification at the state and local level nearly impossible without extensive training.¹⁵³ “Currently, state and local police do not have the training or experience to enforce immigration laws”¹⁵⁴ In order to be effective, those faced with the responsibility of enforcing immigration law must be able to fully understand the law that they are expected to enforce.¹⁵⁵ In a society where money is always an issue, it is difficult to ascertain where the necessary resources and funding would come from to provide for this type of training.

Some may argue that running an individual’s name through a national database hardly calls for extensive training resources. Opponents maintain “that the identification and detention of immigrant violators is rooted in simple legal concepts.”¹⁵⁶ However, the major concern associated with the lack of training available to local police is the increased potential for civil rights violations of U.S. citizens and legal residents who are adversely affected by immigration enforcement efforts.¹⁵⁷ In the area of immigration enforcement, state and local police officers simply “do not have the benefit of experience that federal officers possess.”¹⁵⁸ Furthermore, “[t]he identification of unlawful immigrants necessarily requires judgment calls properly made through training and experience [O]fficers must be skilled in determining legal status without

149. Parlow, *supra* note 10, at 1070.

150. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

151. Parlow, *supra* note 10, at 1070.

152. Boatright, *supra* note 8, at 1670.

153. *Id.* at 1648.

154. INT’L ASS’N OF CHIEFS OF POLICE, ENFORCING IMMIGRATION LAW: THE ROLE OF STATE, TRIBAL AND LOCAL LAW ENFORCEMENT 3 (2004), available at <http://www.theiacp.org/Portals/0/Pdfs/Publications/ImmigrationEnforcementconf.pdf>.

155. *See id.*

156. Greg K. Venbrux, *Devolution or Evolution? The Increasing Role of the State in Immigration Law Enforcement*, 11 UCLA J. INT’L L. & FOREIGN AFF. 307, 329-30 (2006) (citing Hethmon, *supra* note 16, at 130).

157. Yanez & Soto, *supra* note 114, at 12-13.

158. Venbrux, *supra* note 156, at 330.

stepping on the constitutional rights of those lawfully present.”¹⁵⁹

The U.S. Border Patrol, a federal agency, has received much scrutiny over the years resulting from allegations of constitutional violations.¹⁶⁰ There are similar instances of state and local police implicating constitutional issues during their enforcement of federal immigration laws.¹⁶¹ In order to comply with constitutional requirements, specifically “the Fourth Amendment and the Equal Protection Clause, an immigration arrest or detention cannot be based on racial appearance, English-speaking difficulty, or lack of identification.”¹⁶²

In the enforcement of federal immigration law, however, individuals’ physical appearance and their inability to speak fluent English are oftentimes the very basis for an initial stop. For example, in 1997, police officers in Chandler, Arizona, teamed with federal Border Patrol officers in a joint effort to investigate undocumented migrants in the area.¹⁶³ The “Chandler Roundup,” as it was referred, lasted nearly a week and resulted in the arrest and deportation of 432 undocumented migrants of Hispanic descent.¹⁶⁴

Although officers were initially told that probable cause of state or local law violations must exist before conducting stops, an Arizona Attorney General’s Office investigation concluded that many of the stops conducted during the “Chandler Roundup” were based solely on the apparent Mexican descent of the individual.¹⁶⁵ Witnesses reported that police often stopped “anyone who was dark-complexioned or ‘Mexican-looking’ and that ‘non-Mexican-looking’ people were permitted to pass by freely.”¹⁶⁶ Many U.S. citizens and legally permanent residents were questioned during this time ““for no other apparent reason than their skin color or Mexican appearance or use of the Spanish language.””¹⁶⁷ Many of the individuals detained during the “Chandler Roundup” had no prior history of criminal activity separate from their immigration violations and were subsequently voluntarily deported.¹⁶⁸

159. *Id.*

160. *See, e.g.,* Yanez & Soto, *supra* note 114, at 13 (noting reported allegations of “intimidation at gun-point, physical and verbal abuse, use of excessive force, and unwarranted arrests and detentions” of both U.S. citizens and legally present aliens at the border).

161. *Id.* at 13-14 (citing *United States v. Perez-Castro*, 606 F.2d 251 (9th Cir. 1979) (unwarranted arrest of an undocumented migrant)).

162. *Id.* at 16.

163. Arnold, *supra* note 135, at 119-20.

164. *Id.* at 120.

165. *Id.* (citing OFFICE OF THE ATT’Y GEN., STATE OF ARIZ., RESULTS OF THE CHANDLER SURVEY 31 (1997) [hereinafter RESULTS OF THE CHANDLER SURVEY]).

166. *Id.* at 121 (citing RESULTS OF THE CHANDLER SURVEY, *supra* note 165 (recounting the report of a woman stopped by a Chandler police officer who asked, “Hey lady, you Mexican, huh?” before reviewing her immigration papers without ever asking to see any driver’s license or providing any explanation for why she was being questioned. This same woman was stopped two more times during the “Chandler Roundup”)).

167. *Id.* (quoting RESULTS OF THE CHANDLER SURVEY, *supra* note 165).

168. *Id.* (citing RESULTS OF THE CHANDLER SURVEY, *supra* note 165).

The Arizona Attorney General concluded that the “Chandler Roundup” violated the constitutional rights of American citizens and legally present residents in the Chandler area as set forth in the Fourth Amendment and the Equal Protection Clause.¹⁶⁹ The city of Chandler incurred \$400,000 of settlement costs as a result of lawsuits following the “Chandler Roundup,” in which plaintiffs alleged that they were stopped and questioned solely on the basis of their “apparent Mexican descent.”¹⁷⁰ Aside from the costly legal expenses, “even more damaging to the City was the deep distrust the police created in the local community.”¹⁷¹ Now more than a decade following the “Chandler Roundup,” the city of Chandler is formally recognized as an immigration “sanctuary,”¹⁷² presumably influenced in part by the negative impact the Roundup had on citizens and non-citizens alike.

*C. New Strategies for Acclimation: Issuance of
Municipal Identification Cards*

Recently, sanctuary cities began considering a controversial strategy to acclimate the undocumented migrant population into their respective communities through the issuance of municipal identification cards identifying them as residents.¹⁷³ This plan appears to be an extension of the existing policy of issuing driver’s licenses to undocumented migrants, a practice currently used in eight different states, including New York.¹⁷⁴

These municipal identification cards, set with a debit chip, are used by all city residents to open bank accounts, borrow books from public libraries, and access municipal services such as the public beach, the garbage dump, and public parking.¹⁷⁵ In July 2007, New Haven, Connecticut, was the first city to begin issuing these municipal identification cards to all of its residents, upon request, including undocumented migrants.¹⁷⁶ Other U.S. cities have distributed identification cards in the past for access to specific city services, such as borrowing books from the local library; however, the New Haven program is the

169. *Id.* (citing RESULTS OF THE CHANDLER SURVEY, *supra* note 165).

170. *Id.* at 120.

171. Venbrux, *supra* note 156, at 329.

172. *See supra* note 125.

173. Emily Bazar, *Illegal Immigrants Are Issued ID Cards in Some Places*, USA TODAY, Oct. 4, 2007, at 1A.

174. *Id.* New York Motor Vehicles Commissioner David Swarts defended the issuance of driver’s licenses to undocumented migrants: “[It is] important to bring a significant population in New York state out of the shadows . . . [and] allow them to participate in the economy.” *Id.*; *see also* Smith et al., *supra* note 127, at 640-51 (discussing recent trends related to the issuance of driver’s licenses of undocumented migrants).

175. *See* Bazar, *supra* note 173; Wucker, *supra* note 112.

176. Bazar, *supra* note 173 (noting that as of October 2007, 3,700 municipal identification cards were issued in New Haven, Connecticut).

first of its kind to issue identification cards for general use.¹⁷⁷ John DeStefano, mayor of New Haven, defended this program: “You have a population that works hard and lives among us as neighbors; we ought to know who they are.”¹⁷⁸ Estimates suggest that there are approximately 15,000 illegal immigrants currently residing in New Haven—a number accounting for over 10% of the city’s total population.¹⁷⁹ According to Mayor DeStefano, he does not want undocumented migrants to fear local government officials and agencies.¹⁸⁰ “Alienating illegal immigrants fosters a hide-and-seek attitude in which those who have knowledge of a crime will either say nothing or, worse, give shelter to suspected criminals.”¹⁸¹

Those who disagree with the practice of issuing municipal identification cards to undocumented migrants often present public safety related arguments. While he did not identify specific threats or other security concerns, Representative Randy Terrill of Oklahoma argued that “[t]here are huge security concerns when it comes to somebody who is a foreign national in this country possessing [an] official, government-issued ID.”¹⁸² Advocates respond to this concern by arguing that public safety will actually improve by issuing this form of identification because undocumented migrants will be able to buy car insurance and instances of uninsured hit-and-run accidents will presumably decrease as well.¹⁸³ Likewise, advocates urge that the use of these identification cards will reduce crime rates “by widening access to bank accounts so that residents do not have to hide money in mattresses or carry it on them, making them easy targets for muggers.”¹⁸⁴ Undocumented migrants were often considered “‘walking A.T.M.’s’ because they were easy victims who probably would not report crimes for fear of deportation,” seeking aid from local community centers rather than the police.¹⁸⁵

Lawmakers in San Francisco, California; New York City, New York; Madison, Wisconsin; and Miami, Florida, are considering the use of similar forms of identification.¹⁸⁶ As a recent development in immigration policy, only time will tell how effective these identification cards prove to be for both undocumented migrants and citizens alike. The issuance of these cards adds yet another facet to the national debate on immigration policy, as opponents of this practice argue that the “cards ‘raise the specter of local governments conspiring

177. Jennifer Medina, *New Haven Welcomes Immigrants, Legal or Not*, N.Y. TIMES, Mar. 5, 2007, at B1.

178. *Id.*

179. *Getting Carded: Should Illegal Immigrants Get IDs?*, CURRENT EVENTS, Sept. 24, 2007, at 7.

180. Wolpin, *supra* note 3, at 6.

181. *Id.*

182. Bazar, *supra* note 173.

183. *Id.*

184. Wucker, *supra* note 112.

185. Medina, *supra* note 177.

186. Bazar, *supra* note 173.

with illegals to help them stay here.”¹⁸⁷ However, a recent article in the *New York Times* counters that all residents will benefit from a municipal identification card system: “[C]itizens themselves benefit when all residents feel they have a stake and are not pariahs. A place is far better off when people want to come to it than if they are fleeing in fear, and when practical solutions take precedence over mean-spirited non-solutions.”¹⁸⁸

IV. 2007 CONGRESSIONAL PROPOSALS

Representatives in Congress have reacted in recent years to society’s call for clarification as to the proper role of state and local government in the enforcement of federal immigration law. However, many of their proposals for improvements related to immigration policy currently remain in committee, with progress moving slowly. Representatives introduced two notable pieces of legislation in 2007 relevant to those state and local governments struggling to determine the role they will play in the “illegal immigration” debate: (1) the No Sanctuary for Illegals Act,¹⁸⁹ and (2) the Clear Law Enforcement for Criminal Alien Removal Act.¹⁹⁰

A. *The No Sanctuary for Illegals Act*

Although no local governments within Indiana have passed sanctuary-type legislation to date, the issue hit close to home recently. On September 17, 2007, Representative Dan Burton of Indiana introduced legislation aimed directly at sanctuary cities that would have a nationwide impact if adopted. Entitled the No Sanctuary for Illegals Act, the text of the bill states:

(a) In General. No officer or employee of the Federal Government may provide Federal funds to any State, or political subdivision of a State, that is determined by the Secretary of Homeland Security to be interfering with efforts to enforce Federal immigration laws.

(b) Termination of Funding Prohibition. Subsection (a) shall cease to be effective with respect to a State or political subdivision denied funds under such subsection when the Secretary of Homeland Security certifies that the State or political subdivision has entered into an agreement with the Secretary of Homeland Security to cease such interference.¹⁹¹

The No Sanctuary for Illegals Act, as proposed, represents a “coercive”

187. *Id.* (quoting Tom Fitton, president of Judicial Watch).

188. Wucker, *supra* note 112.

189. H.R. 3549, 110th Cong. (2007).

190. H.R. 842, 110th Cong. (2007).

191. No Sanctuary for Illegals Act, H.R. 3549, 110th Cong. §§ 2(a)-(b) (2007). Representative Burton was the sole sponsor of the No Sanctuary for Illegals Act. See The Library of Congress, H.R. 3549 Bill Status, <http://www.thomas.gov> (last visited Feb. 7, 2009). As of the time of this Note’s publication, the Act was still before the House Judiciary Committee and the House Oversight and Government Reform Committee. *Id.*

approach to federal immigration policy, which attempts to coerce states and localities into abandoning their sanctuary policies out of fear of repercussions¹⁹²—in this case, denial of federal funding. If adopted, the No Sanctuary for Illegals Act, would ratify the argument that sanctuary policies violate federal law.¹⁹³

In defense of his proposed bill, Representative Burton stated, “This bill is designed to stop American tax dollars from going to [s]tates and cities and their officials that have no respect for our country’s laws All elected officials, regardless of where they serve, are bound by the law of the United States.”¹⁹⁴

There is no clear consensus at this time on whether or not other members of Congress share Representative Burton’s ideas regarding sanctuary cities.¹⁹⁵ Withholding federal funds from state and local governments with sanctuary policies in place “has the advantage of being a quick way to punish and deter defiant localities.”¹⁹⁶ However, this type of coercive approach may not be the most efficient manner to gain state and local government assistance in the fight against illegal immigration. Even if the No Sanctuary for Illegals Act is adopted, it does not guarantee that all state and local governments will be persuaded to drop their sanctuary policies.¹⁹⁷ “A worst-case scenario, [therefore], is that such a policy might endanger citizens by depriving a locality of needed homeland security funding that later experienced a terrorist attack.”¹⁹⁸

B. The Clear Law Enforcement for Criminal Alien Removal Act of 2007

On February 6, 2007, Representative Charles Norwood introduced into the U.S. House of Representatives the Clear Law Enforcement for Criminal Alien Removal Act (CLEAR Act).¹⁹⁹ Representative Norwood introduced two earlier variations of the CLEAR Act in 2003 and 2005.²⁰⁰ Among its many provisions, as proposed, the CLEAR Act outlines a program providing: (1) financial

192. See Boatright, *supra* note 8, at 1659-62. Boatright suggests that “Congress can catch more flies with the ‘honey’ of the federalist system than it can by coercing cooperation with the ‘vinegar’ of withheld federal funds.” *Id.* at 1637.

193. No Sanctuary or Illegals Act, H.R. 3549, 110 Cong. § 2(a).

194. *Rep. Burton Introduces ‘No Sanctuary for Illegals Act’*, US FED. NEWS, Sept. 17, 2007, available at 2007 WLNR 18321470.

195. It should be noted that Representative Burton was the sole sponsor of the No Sanctuary for Illegals Act. See The Library of Congress, *supra* note 191. Likewise, the track record for similar legislation does not offer much hope for this Act’s success. In 2003, proposed legislation that would cut off federal anti-terror funding to sanctuary cities was overwhelmingly defeated by a vote of 102 to 324 in the House of Representatives. Carpenter, *supra* note 9, at 3.

196. Douglas R. Sahmel, Comment, *How Maryland’s Sanctuary Policies Isolate Federal Law and the Constitution While Undermining Criminal Justice*, 36 U. BALT. L.F. 149, 162 (2006).

197. *Id.* at 162.

198. *Id.* at 162-63.

199. H.R. 842, 110th Cong. (2007).

200. See H.R. 3137, 109th Cong. (2005); H.R. 2671, 108th Cong. (2003).

assistance to state and local police departments that assist in the enforcement of federal immigration laws;²⁰¹ and (2) extensive training mechanisms for state and local law enforcement personnel in the “investigation, identification, apprehension, arrest, detention, and transfer to Federal custody of aliens unlawfully present in the United States.”²⁰² As of the date of this writing, all three variations of the CLEAR Act have failed to move past committee.²⁰³

The CLEAR Act’s failure to move past the committee stage of the legislative process is perhaps a result of its coercive undertone. Like the No Sanctuary for Illegals Act, the 2007 CLEAR Act conditions the receipt of federal funds on the cooperation of state and local governments in immigration enforcement efforts.²⁰⁴ Specifically, the bill states:

In General—Effective two years after the date of the enactment of this Act, a State, or a political subdivision of a State, that has in effect a statute, policy, or practice that prohibits law enforcement officers of the State, or of a political subdivision of the State, from assisting or cooperating with Federal immigration law enforcement in the course of carrying out the officers’ routine law enforcement duties shall not receive any of the funds that would otherwise be allocated to the State under section 241(i) of the Immigration and Nationality Act (8 U.S.C. 1231(i)).²⁰⁵

The CLEAR Act provides that any funds not allocated to state and local governments with sanctuary policies in place will be reallocated upon compliance with the aforementioned section.²⁰⁶ In other words, federal funds will be reallocated only upon the dismissal of any sanctuary policy currently in place.²⁰⁷

C. Coercive Versus Permissive Approaches: Recommendations from the International Association of Chiefs of Police

According to the International Association of Chiefs of Police (IACP), legislation that seeks to solicit state and local aid in immigration enforcement must contain the following five elements in order to be successful: (1) voluntariness; (2) authority clarification; (3) systematic incentives; (4) a liability shield; and (5) appropriate training resources.²⁰⁸ Of these five elements, the

201. Clear Law Enforcement for Criminal Alien Removal Act, H.R. 842, 110th Cong. §§ 3(a), 7 (2007).

202. *Id.* § 10(a)(1).

203. The Library of Congress, <http://www.thomas.gov> (last visited Feb. 7, 2009).

204. Clear Law Enforcement for Criminal Alien Removal Act, H.R. 842, 110th Cong. § 3(a) (2007).

205. *Id.*

206. *Id.* § 3(c).

207. *Id.*

208. INT’L ASS’N OF CHIEFS OF POLICE, *supra* note 154, at 5-6.

IACP focuses its attention on the voluntary nature, or lack thereof, of proposed legislation: “[A]ny legislative proposals that seek to coerce cooperation through the use of sanction mechanisms that would withhold federal assistance funds from states or localities is unacceptable”²⁰⁹

Denial of federal funding altogether, as proposed by the No Sanctuary for Illegals Act, is a coercive approach to federal immigration policy.²¹⁰ It fails to meet the IACP’s recommendations related to effective legislation. Many state and local governments rely on federal funding. To premise the distribution of these funds solely on a local government’s willingness to cooperate in immigration enforcement is overly coercive and fails to meet the “voluntariness” element that the IACP emphasizes so strongly.

The 2007 CLEAR Act shows much promise, as it incorporates many of the IACP recommendations related to effective legislation to increase nonfederal immigration enforcement.²¹¹ As proposed, the 2007 CLEAR Act outlines the authority of state and local police to investigate, apprehend, arrest and detain individuals unlawfully present in the United States.²¹² Likewise, the CLEAR Act provides financial assistance and training mechanisms for state and local law enforcement agencies who decide to aid in federal immigration enforcement efforts.²¹³

However, the CLEAR Act falls short in one important aspect: its involuntary nature. Due to this shortcoming, the IACP did not hesitate to announce its opposition when it “urged Congress to proceed with caution when considering measures that would compel local and state law enforcement agencies to enforce federal immigration laws.”²¹⁴ According to IACP President Joseph Estey, Chief of the Hartford, Vermont, Police Department, “The CLEAR Act’s reliance on sanctions is bad for local law enforcement agencies. If Congress is serious about asking state, tribal and local agencies to assume these additional duties it should focus on giving them the tools they need to combat all crimes not just illegal immigration.”²¹⁵

A permissive approach is a better alternative if Congress is interested in gaining nonfederal assistance in immigration enforcement. In essence, a permissive approach would “leave the ball in the court of each state and locality to weigh the costs and benefits of such a policy and ascertain its own community’s comfort level.”²¹⁶ “Police chiefs know what is best for their communities and should be the ones to decide whether or not their agencies will

209. *Id.* at 5.

210. *See supra* text accompanying note 192.

211. *See supra* text accompanying notes 201-04.

212. Clear Law Enforcement for Criminal Alien Removal Act, H.R. 842, 110th Cong. § 6 (2007).

213. *Id.* § 7.

214. Press Release, Int’l Ass’n of Chiefs of Police, Police Chiefs Announce Immigration Enforcement Policy (Dec. 1, 2004) (on file with author).

215. *Id.*

216. Boatright, *supra* note 8, at 1665.

be involved in enforcing federal immigration laws”²¹⁷

CONCLUSION

The United States was once considered a land of immigrants, and a “melting pot” of cultures and identities. That conglomeration, however, has quickly dissipated and now resembles anything but the “melting pot” that it once was. The current state of immigration law and policy in the United States is broken, and advocates on both sides of the debate agree that improvements are necessary.

From a public policy perspective, it is important to note the large number of states, counties, and municipalities that have followed suit in this “sanctuary” movement. Many prominent areas are making their stance on immigration known by the passage of these sanctuary policies, and in essence, disassociating themselves from federal immigration policy initiatives. As such, it is important to consider these cities’ positions. Likewise, it is equally important to consider *all* of the interests involved in this debate, including not only government at the federal, state and local level, but also the interests of local communities across the nation, and the residents living within them.

There is no simple solution to the problems the United States currently faces in regards to its fractured immigration system. Local, state, and federal governments need to begin to work together in order to establish a united front on immigration policy, and create a comprehensive plan for reform. A comprehensive solution will take time; however, there are intermediate steps Congress can take. The federal government may offer grants to state and local governments in order to alleviate the immigration-related budgetary restraints these entities currently bear in regards to healthcare, education, and criminal justice. Policymakers from across the nation, regardless of their stance on immigration, must come together in order to give due consideration to all interests involved before significant progress is made.

A coercive approach that cuts off federal funding to local entities altogether is a drastic approach that does not appear to be effective. Instead of denying federal funds to state and local governments that have adopted sanctuary policies, a better approach would be investing additional resources in the federal immigration enforcement efforts currently in place. Rather than relying on local law enforcement officers to enforce federal immigration law, Congress should provide ICE with the funds necessary to establish a workforce of enforcement officers large enough to minimize the “5,000 to 1” disparity it currently faces.²¹⁸

ICE continues to evolve as an organization. On March 1, 2008, ICE celebrated its five year anniversary.²¹⁹ During the past five years, records show

217. Press Release, Int’l Ass’ of Chiefs of Police, *supra* note 214 (quoting IACP President Estey).

218. *See supra* text accompanying note 74.

219. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, ICE, *supra* note 76, at 1 (noting that ICE was officially created on March 1, 2003, as a component of the Department of Homeland Security).

that ICE has made tremendous progress in carrying out its mission “to protect America and uphold public safety.”²²⁰ Detecting and apprehending the estimated twelve million undocumented migrants currently living in the United States is hardly a task that can feasibly be completed within a day, a month, or even five years. ICE has the potential to be successful in its enforcement efforts, so long as it receives the necessary funding and support from the federal government.

The power to regulate immigration is traditionally recognized as a federal responsibility.²²¹ Likewise, the federal government is by law the primary *enforcer* of federal immigration law.²²² Neither Congress nor the courts has stated in clear and unequivocal terms the exact role state and local governments are to play in federal immigration enforcement efforts; nor have they provided state and local governments with the appropriate training and funding necessary to effectively assist in immigration enforcement. Until this happens, compelling immigration enforcement duties upon state and local government agencies places a burden on those who are critically unequipped and inappropriately funded to effectively manage it.

220. *Id.* at 2.

221. LEGOMSKY, *supra* note 5, at 103-06.

222. *See* U.S. Immigration and Customs Enforcement, *supra* note 72.

WHY CAN'T PROPERTY TRANSFERS RESOLVE AN ESTABLISHMENT CLAUSE PROBLEM? THE DIVIDE BETWEEN THE NINTH AND SEVENTH CIRCUITS AFTER *BUONO V. KEMPTHORNE*

VICTORIA R. CALHOON*

INTRODUCTION

A white cross sits atop a large rock on the Mojave National Preserve in San Bernardino County, California. Controversy over the cross's presence on federal land began in 1999 as an alleged violation of the Establishment Clause¹—legislation and litigation ensued soon after.² The Ninth Circuit recently ruled in *Buono v. Kempthorne* (*Buono IV*)³ that a proposed transfer of the property surrounding the cross violated a 2002 district court injunction barring the display of the cross on federal property.⁴ Under this transfer proposal, a local chapter of the Veterans of Foreign Wars (VFW) would assume ownership of the cross, which it erected decades earlier as a war memorial.⁵ In the court's view, the property transfer did not cure the Establishment Clause violation because the cross would still appear to be located on government property, and the transfer was perceived as an attempt to skirt the injunction.⁶ The Ninth Circuit's determination that the *Buono* cross violated the Establishment Clause, and the accompanying injunction, has had its critics, including Justice Clarence Thomas: "If a cross in the middle of a desert establishes a religion, then no religious observance is safe from challenge."⁷

The Establishment Clause in the First Amendment to the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion."⁸ Legal commentators have varied opinions on what it means to have a law that

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1. U.S. CONST. amend. I, cl. 1.

2. *Buono v. Kempthorne* (*Buono IV*), 502 F.3d 1069, 1072-74 (9th Cir. 2007), *opinion amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

3. *Id.* at 1069.

4. *Id.* at 1071. A rehearing *en banc* was denied on May 14, 2008, though several judges criticized the substance of the *Buono IV* opinion. *Buono v. Kempthorne* (*Buono V*), 527 F.3d 758, 759-68 (9th Cir. 2008) (O'Scannlain, J., dissenting), *cert. granted sub nom.* Salazar v. Buono, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

5. *Buono IV*, 502 F.3d at 1072, 1074.

6. *Id.* at 1085-86.

7. *Van Orden v. Perry*, 545 U.S. 677, 695 (2005) (Thomas, J., concurring).

8. U.S. CONST. amend. I, cl. 1.

establishes a religion. Some believe that this clause barred establishment of a national religion,⁹ while others characterize it as requiring a “wall of separation between church and State.”¹⁰ In a 2005 Supreme Court case, *Van Orden v. Perry*,¹¹ Chief Justice Rehnquist admitted in several parts of the majority opinion that the Establishment Clause jurisprudence was muddled.¹²

The *Buono IV* ruling adds to this confusion. That decision is in direct conflict with a 2005 decision by the Seventh Circuit, *Mercier v. Fraternal Order of Eagles*,¹³ which ruled that transfer of a piece of property around a Ten Commandments memorial to a private organization was not a violation of the Establishment Clause.¹⁴ Both decisions indicate a tension between the courts’ handling of cases involving the sale of property containing religious monuments to private parties to solve an Establishment Clause violation. Furthermore, it begs the question of whether a government agency can only remedy such a violation by removing the religious symbol.

This Note analyzes the reasoning applied by the Ninth Circuit in *Buono IV* and contrasts it with the Seventh Circuit’s treatment of similar legal issues in *Freedom from Religion Foundation, Inc. v. City of Marshfield (Marshfield)*¹⁵ and *Mercier*. Part I of this Note provides an overview of Establishment Clause cases from the Supreme Court, Ninth Circuit, and Seventh Circuit. These cases, especially *Marshfield* and *Mercier*, form the backdrop for evaluating *Buono IV* which are explained in greater detail. Part II describes the legislative and

9. “[I]t must be concluded that the establishment clause of the first amendment . . . was not intended to prevent any government aid to religion but was intended rather to prevent the establishment of a national religion.” Harold J. Berman, *Religion and Law: The First Amendment in Historical Perspective*, 35 EMORY L.J. 777, 785 (1986).

10. *Reynolds v. United States*, 98 U.S. 145, 164 (1878). The term “wall of separation” is attributed to Thomas Jefferson. See Berman, *supra* note 9, at 783 n.22. Chief Justice Burger once stated that “we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: ‘sponsorship, financial support, and active involvement of the sovereign in religious activity.’” *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 668 (1970)). Justice Thomas stated that evidence of government “coercion [to adopt a given religion should be] the touchstone for our Establishment Clause inquiry. Every acknowledgement of religion would not give rise to an Establishment Clause claim.” *Van Orden*, 545 U.S. at 697 (Thomas, J., concurring). Justice Thomas also believed that using coercion as the primary inquiry would make Supreme Court precedent “capable of consistent and coherent application.” *Id.*

11. 545 U.S. 677 (2005).

12. Chief Justice Rehnquist described the Supreme Court’s line of cases in this area of the law as “Januslike,” *id.* at 683, and listed the Court’s inconsistent application of legal tests such as the *Lemon* test as evidence that the Establishment Clause presents a complex legal issue. *Id.* at 685-86.

13. 395 F.3d 693 (7th Cir. 2005).

14. *Id.* at 702.

15. 203 F.3d 487 (7th Cir. 2000).

procedural background of *Buono IV* and the three previous *Buono* cases.¹⁶ Part III outlines the district court and the Ninth Circuit's treatment of the property transfer issue in *Buono v. Norton (Buono III)*¹⁷ and *Buono IV* and applies various legal tests to the *Buono* cases to determine that the proper outcome was not reached.

I. OVERVIEW OF KEY ESTABLISHMENT CLAUSE CASES

Although the Ninth Circuit ruled differently in *Buono IV* than the Seventh Circuit did in *Marshfield* and *Mercier*, these rely on some of the same cases. *Lemon v. Kurtzman*,¹⁸ a key Supreme Court case discussing the Establishment Clause, set out a test used by courts for over thirty years to analyze potential violations of the Establishment Clause.¹⁹ Even though the *Lemon* test is often used, two other tests, the "endorsement test"²⁰ and the "reasonable observer test,"²¹ emerged from concurring opinions by Justice O'Connor in *Lynch v. Donnelly*²² and *Capitol Square Review & Advisory Board v. Pinette*.²³ These tests are not necessarily independent, but are sometimes used in conjunction with the *Lemon* test.²⁴ *Van Orden*, a 2005 Supreme Court case, provides an alternative to *Lemon* test when evaluating monuments.²⁵ These cases supply part of the backdrop for the Ninth Circuit's decision in *Buono IV*.

The Seventh Circuit provided a framework in *Marshfield* and *Mercier* that the Ninth Circuit employed in its *Buono IV* analysis, though the court ultimately came to an opposite conclusion.²⁶ The different result is due in part to Ninth Circuit precedent, most notably *Separation of Church and State Committee v. City of Eugene (SCSC)*,²⁷ which in the words of the Ninth Circuit, "squarely

16. *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004); *Buono v. Norton (Buono II)*, 371 F.3d 543 (9th Cir. 2004); *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175 (C.D. Cal. 2005), *aff'd sub nom. Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

17. 364 F. Supp. 2d 1175 (C.D. Cal. 2005).

18. 403 U.S. 602 (1971).

19. *Id.* at 612-13.

20. *See Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

21. *See Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780-81 (1995) (O'Connor, J., concurring).

22. 465 U.S. 668 (1984).

23. 515 U.S. 753 (1995).

24. *See Buono v. Norton (Buono II)*, 371 F.3d 543, 550 (9th Cir. 2004).

25. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005).

26. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1081-86 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

27. 93 F.3d 617 (9th Cir. 1996) (*per curiam*).

controlled” the *Buono* cases.²⁸

A. Supreme Court Precedent

1. *Lemon v. Kurtzman*.—The central issue in *Lemon* was whether state aid to non-public schools within Rhode Island and Pennsylvania violated the Establishment Clause.²⁹ A plurality of the Court held that both states’ practices were unconstitutional.³⁰ Chief Justice Burger, writing for the plurality, “gleaned” three tests through “consideration of the cumulative criteria developed by the Court over many years.”³¹ These three analyses are: “First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion[;] finally, the statute must not foster ‘an excessive government entanglement with religion.’”³²

The Court has applied this test inconsistently,³³ and two years after the Court outlined the *Lemon* test, it described its factors as “no more than helpful signposts.”³⁴ Regardless of the Supreme Court’s wavering adherence to the *Lemon* test, both the Seventh and Ninth Circuits continue to use this analysis.³⁵

2. *Lynch v. Donnelly*.—The controversy in *Lynch* involved a nativity scene in a municipal Christmas display.³⁶ A majority of the Court overruled a lower court determination that this display violated the Establishment Clause.³⁷ In her concurrence, Justice O’Connor attempted to clarify Establishment Clause doctrine³⁸ by reformulating parts of the *Lemon* test into an “endorsement test”: “The purpose prong of the *Lemon* test asks whether government’s actual purpose is to endorse or disapprove of religion. The effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.”³⁹ Justice O’Connor further

28. See *Buono II*, 371 F.3d at 548; see also *Buono IV*, 502 F.3d at 1075.

29. *Lemon v. Kurtzman*, 403 U.S. 602, 606 (1971).

30. *Id.* at 607.

31. *Id.* at 612.

32. *Id.* at 612-13 (citation omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)).

33. Compare *Wallace v. Jaffree*, 472 U.S. 38, 55-60 (1985) (applying *Lemon* test), with *Marsh v. Chambers*, 463 U.S. 783, 792-95 (1983) (not applying *Lemon* test). See also Jesse H. Choper, *The Endorsement Test: Its Status and Desirability*, 18 J.L. & POL. 499, 499-505 (2002) (describing the “demise” of the *Lemon* test even though it has never been overruled).

34. *Hunt v. McNair*, 413 U.S. 734, 741 (1973). One commentator states that the Supreme Court has “implicitly abandoned” the *Lemon* test. Choper, *supra* note 33, at 499.

35. See, e.g., *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 704-05 (7th Cir. 2005); *Buono v. Norton (Buono II)*, 371 F.3d 543, 548-50 (9th Cir. 2004); *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493-94, (7th Cir. 2000).

36. *Lynch v. Donnelly*, 465 U.S. 668, 670-71 (1984).

37. *Id.* at 672.

38. *Id.* at 687 (O’Connor, J., concurring).

39. *Id.* at 690.

explained the danger of government endorsement of religion: “Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.”⁴⁰ While the endorsement test came from a concurring opinion, subsequent Supreme Court opinions have treated it favorably.⁴¹

3. *Capitol Square Review & Advisory Board v. Pinnette*.—The *Capitol Square* case concerned a state board’s denial of the Ku Klux Klan’s application to display a large cross on a 10-acre plaza owned by the state of Ohio.⁴² A majority of the Justices agreed that denial of the application was unconstitutional because it infringed upon private religious speech.⁴³ A minority of the Court stated that an Establishment Clause violation does not exist when private religious speech takes place in a public forum.⁴⁴

The Court also disagreed about how to characterize a “reasonable observer.”⁴⁵ In a concurring opinion, Justice O’Connor explained that “the endorsement test necessarily focuses upon the perception of a reasonable, informed observer.”⁴⁶ This reasonable observer “in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious display appears.”⁴⁷ The reasonable observer inquiry focuses on the perceptions of a hypothetical reasonable observer within the community, not whether a particular individual is offended by a government practice.⁴⁸

4. *Van Orden v. Perry*.—*Van Orden* involved a Ten Commandments monument installed on the Texas State Capitol grounds in 1961 by the Fraternal Order of Eagles.⁴⁹ This monument was one of seventeen on the twenty-two acre grounds.⁵⁰ This case established a different standard than the *Lemon* test for evaluating the religious implications of the presence of a monument. According to the plurality in *Van Orden*, the *Lemon* test is “not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds. Instead, our analysis is driven both by the nature of the monument and by our Nation’s

40. *Id.* at 688.

41. *See, e.g., County of Allegheny v. ACLU*, 492 U.S. 573, 594-97 (1989); *see also Choper, supra* note 33, at 504-08.

42. *Capitol Square Review & Advisory Bd. v. Pinnette*, 515 U.S. 753, 757-58 (1995).

43. *Id.* at 760-61. Before the review board denied the Ku Klux Klan’s application, it approved display of a Christmas tree and menorah. *Id.* at 758.

44. *Id.* at 770. This is characterized as a per se rule by the Seventh Circuit in *Marshfield. Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493-94 (7th Cir. 2000).

45. *Capitol Square*, 515 U.S. at 772-73. (O’Connor, J., concurring).

46. *Id.* at 773.

47. *Id.* at 780.

48. *Id.* at 779-80.

49. *Van Orden v. Perry*, 545 U.S. 677, 681-82 (2005).

50. *Id.* at 681.

history.”⁵¹ While this case did not address the transfer of property, it is instructive as a recent Supreme Court case discussing the Establishment Clause.

*B. Important Ninth Circuit Precedent:
Separation of Church and State v. City of Eugene (SCSC)*

In evaluating the cross under the effect prong of the *Lemon* test in *Buono v. Norton (Buono II)*,⁵² the Ninth Circuit extensively compared the *Buono* cross to the cross at issue in *Separation of Church and State Committee v. City of Eugene (SCSC)*.⁵³ SCSC involved a fifty-one-foot-tall cross designated as a war memorial when it was deeded to the city of Eugene, Oregon.⁵⁴ The memorial designation occurred several years after its construction in response to litigation.⁵⁵ In SCSC the Ninth Circuit held that the cross was a symbol of Christianity and violated the Establishment Clause because “the cross may reasonably be perceived as [a] governmental endorsement of Christianity.”⁵⁶ The Ninth Circuit urged that SCSC “squarely controlled” the *Buono* case; thus, it played a central role in the court’s analysis of the *Buono* cross.⁵⁷

C. The Seventh Circuit’s Approach in Marshfield and Mercier

Similar to the *Buono* cases, *Marshfield* and *Mercier* dealt with religious symbols or monuments on government property.⁵⁸ In *Marshfield*, the Seventh Circuit created an “unusual circumstances” analysis to address cases in which a government entity attempts to transfer a religious monument to a private party in order to address an Establishment Clause violation.⁵⁹ The court stated: “Absent unusual circumstances, a sale of real property is an effective way for a public body to end its inappropriate endorsement of religion [W]e look to the substance of the transaction as well as its form to determine whether government action endorsing religion has actually ceased.”⁶⁰ Interestingly, the Ninth Circuit used this analytic framework to assess the transfer of the *Buono* cross to a private

51. *Id.* at 686.

52. 371 F.3d 543 (9th Cir. 2004).

53. *Id.* at 548-49 (9th Cir. 2004) (citing *Separation of Church & State Comm. v. City of Eugene (SCSC)*, 93 F.3d 617 (9th Cir. 1996) (per curiam)).

54. SCSC, 93 F.3d at 618.

55. *Id.*

56. *Id.* at 620.

57. *Buono II*, 371 F.3d at 548. *Accord* *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1075 (9th Cir. 2007), *amended and superseded on denial of reh’g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* *Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

58. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 489 (7th Cir. 2000) (Jesus statue); *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 694 (7th Cir. 2005) (Ten Commandments monument).

59. *Marshfield*, 203 F.3d at 491.

60. *Id.*

organization.⁶¹

1. *Facts of Marshfield*.—In *Marshfield*, legal controversy surrounded a fifteen-foot-tall statue of Jesus Christ donated by the Knights of Columbus to Marshfield in 1959.⁶² Thirty-nine years later in 1998, the City sold the statue to a private memorial fund in response to a lawsuit alleging that the statue's presence in a public park was a violation of the Establishment Clause.⁶³

2. *The "Unusual Circumstances" Analysis*.—The "unusual circumstances" analysis arose out of a line of "public function" cases that concerned continued government involvement despite transfer of public land to private parties as illustrated by "a set of unusual facts and circumstances."⁶⁴ One of these cases focused on by the Seventh Circuit was *Evans v. Newton*.⁶⁵ *Evans* involved a tract of land that a testator left to the city of Macon, Georgia, for the purposes of having a park that could only be used by white people.⁶⁶ Macon honored the testator's wishes for decades until the city determined that because the park was a public facility it was not legal to segregate it based on race.⁶⁷ Once Macon agreed to desegregate the park, several parties sued to enforce the discriminatory covenants and to have Macon officials removed as trustees for the park.⁶⁸ A lower court allowed the trustees to be replaced and transferred ownership of the park to a private group.⁶⁹ However, the Supreme Court ruled that transferring ownership to a private trustee did not change the perception of the park as a public place because the tradition of municipal control was "firmly established."⁷⁰ The park's public function made it subject to the requirements of the Fourteenth Amendment.⁷¹

In *Marshfield*, the Seventh Circuit distinguished *Evans* and other public function cases because government involvement with the Jesus statue ceased once the property was transferred to a private party.⁷² The usefulness of the public function cases was tied to the level of government involvement: "[T]hese cases remain relevant only if we find continuing and excessive involvement between the government and private citizens."⁷³

3. *Factors That Demonstrate Unusual Circumstances*.—Several factors can

61. *Buono IV*, 502 F.3d at 1081-85.

62. *Marshfield*, 203 F.3d at 489.

63. *Id.* at 489-90.

64. *Id.* at 492. See, e.g., *Terry v. Adams*, 345 U.S. 461 (1953); *Marsh v. Alabama*, 326 U.S. 501 (1946).

65. 382 U.S. 296 (1966).

66. *Id.* at 297.

67. *Id.*

68. *Id.* at 297-98.

69. *Id.* at 298.

70. *Id.* at 301.

71. *Id.* at 302.

72. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000).

73. *Id.*

be used to determine whether the government involvement is excessive, inappropriate, or continued. These factors include the nature of the sale, whether a fair market price is paid, and whether the purchaser has “assumed the traditional duties of ownership.”⁷⁴ The court in *Marshfield* found that the transfer of the Jesus statue and surrounding land was proper even though alternate bids were not sought and the City imposed a restrictive covenant on the deed that limited the use of the property to “public park purposes.”⁷⁵

4. *Application of the Lemon Test in Marshfield.*—The next part of the court’s analysis involved use of the three-part *Lemon* test to determine whether the statue’s placement within the public park was a continuing endorsement of religion.⁷⁶ In regards to the secular purpose prong, the court readily admitted that it was difficult to find a secular purpose to the Jesus statue other than beautification of the park, which was frankly weak in comparison to the prominent religious message.⁷⁷

Discussion of the effect prong of the *Lemon* test included a consideration of the public nature of the park.⁷⁸ Using reasoning from a minority of the justices in *Capitol Square*, the court evaluated the park using a “*per se* rule that the government has not violated the Establishment Clause by providing a public forum where religious speech is conducted by purely private parties, so long as the forum is open to all on equal terms.”⁷⁹

The court also evaluated the statue using the “endorsement test” from Justice O’Connor’s concurrence in *Lynch v. Donnelly*.⁸⁰ While the Jesus statue and a small parcel of land surrounding it were privately owned, the court still treated the parcel as a public forum due to its location within a public park.⁸¹ However, the court also considered the statue an expression of private religious speech.⁸²

Ultimately, the Seventh Circuit held that the sale itself was not a government act that endorsed religion.⁸³ Under either the *Capitol Square* *per se* rule or from the perspective of a reasonable observer in the traditional endorsement test, the court determined that “the present layout of the park invite[d] a perception of a

74. *Id.*

75. *Id.* at 492-93. The court added that “the fact that a covenant exists will not affect the validity of the transfer. . . . [S]uch action [to enforce the covenant] would relate to the conduct of the parties following the sale of the property, so at this time, we need not address whether such action would constitute . . . [a] violation of the Establishment Clause.” *Id.*

76. *Id.* at 493-96. For the *Lemon* test prongs, see *supra* text accompanying note 32.

77. *Id.* at 493.

78. *Id.* at 493-94.

79. *Id.* (citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 770 (1995)). For background on *Capitol Square*, see *supra* text accompanying notes 42-48.

80. “Under this test, ‘[t]he effect prong asks whether, irrespective of government’s actual purpose, the practice under review in fact conveys the message of endorsement or disapproval.’” *Id.* at 493 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring)).

81. *Marshfield*, 203 F.3d at 494.

82. *Id.* at 495.

83. *Id.* at 497.

government endorsement of religion.”⁸⁴ The court noted that there was no physical differentiation or visual boundary to inform visitors that the statue was privately owned and to distinguish it from the surrounding park land, which had the effect of giving the statue preferential treatment.⁸⁵ The case was remanded to the district court to come up with a “narrowly tailored” remedy because the holding above “limit[ed] private speech in a public forum.”⁸⁶ The court did not order the statue removed, but suggested that

should the City (on City property) construct some defining structure, such as a permanent gated fence or wall, to separate City property from Fund property accompanied by a clearly visible disclaimer, . . . we doubt that a reasonable person would confuse speech made on Fund property with expressive endorsement made by the City.⁸⁷

On remand, the district court determined that a four-foot-tall iron fence with two large disclaimer signs cured the perception of the city endorsing religion.⁸⁸

5. *Application of the “Unusual Circumstances” Analysis to Mercier.*—In *Mercier*, the religious symbol at issue was a Ten Commandments monument.⁸⁹ Similar to the situation in *Marshfield*, the city of La Crosse, Wisconsin, negotiated a sale of the monument in response to a suit over the monument’s presence in a downtown park.⁹⁰ After several offers from different groups to move the monument were rejected, the City decided to sell the monument to the local Fraternal Order of Eagles, which had donated the monument in June 1965.⁹¹ The monument was also dedicated to high school students who volunteered during a serious flood in La Crosse during the spring of 1965.⁹² Likely in response to *Marshfield*, the City erected a fence around the monument, along with a sign noting that this monument was a private park and not an endorsement of religion.⁹³ The suit continued, and the district court ruled that the monument was a violation of the Establishment Clause, which the sale did not cure, and further that the sale itself was an independent violation of the Establishment

84. *Id.* at 496.

85. *Id.*

86. *Id.* at 497.

87. *Id.*

88. *Freedom from Religion Found., Inc. v. City of Marshfield*, No. 98-C-270-S, 2000 WL 767376, at *1 (W.D. Wis. May 9, 2000). For a photograph of the statue, fence, and signage see Freedom From Religion Foundation, http://www.ffrf.org/legal/images/JesusMarshfield_after.jpg (last visited Mar. 12, 2009). Even the primary plaintiff in the suit against Marshfield was happy with the result because he saw the fence as a “memorial to the First Amendment.” Clarence Reinders, “*We Done Good*” FREETHOUGHT TODAY, Jan./Feb. 2001, available at http://ffrf.org/fttoday/2001/jan_feb01/reinders.html.

89. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 694-95 (7th Cir. 2005).

90. *Id.* at 696.

91. *Id.*

92. *Id.*

93. *Id.* at 697-98.

Clause.⁹⁴

In reviewing the case, the Seventh Circuit applied the “unusual circumstances” analysis from *Marshfield* and determined that none existed in the sale of the monument.⁹⁵ The sale of the property around the monument to the Eagles was not a sham transaction because it divested the City from any further responsibility or oversight of the property.⁹⁶ The sale conformed to applicable state laws.⁹⁷ The court did not find it unusual that only the Eagles were offered the property because they had originally given the monument to the city and their headquarters were located adjacent to the park.⁹⁸

6. *Applying the Lemon Test to Mercier*.—The Seventh Circuit in *Mercier* also found that the sale of the monument satisfied the *Lemon* test, even though that test had not been constructed to analyze the sale of a religious symbol on government property.⁹⁹ The court evaluated whether the sale had a secular purpose (first prong) and whether the primary effect of the sale advanced or inhibited religion (second prong).¹⁰⁰ The court did not address the third prong of the *Lemon* test, whether the sale fostered an excessive entanglement with religion, because it held that the sale demonstrated disentanglement with religion.¹⁰¹

In reviewing the monument’s history, the court noted that while it had a religious purpose, there was also the secular purpose of honoring volunteers during the flood.¹⁰² The City had a secular motive for the sale as well—avoiding litigation.¹⁰³ The court also rejected the argument that the City showed a preference for the monument’s religious purpose by allowing it to stay in place.¹⁰⁴ Furthermore, “[t]he desire to keep the Monument in place cannot automatically be labeled a constitutional violation. Removal is always an option, but as *Marshfield* holds, it is not a necessary solution to a First Amendment challenge.”¹⁰⁵

In evaluating the effect prong, the court determined that “[a] reasonable person, considering the history of the monument recited above, would understand

94. *Mercier v. City of La Crosse*, 305 F. Supp. 2d 999, 1003, 1012-14 (W.D. Wis. 2004), *rev’d sub nom. Mercier v. Fraternal Order of Eagles*, 395 F.3d 693 (7th Cir. 2005).

95. *Mercier*, 395 F.3d at 702-04. The court did not evaluate whether the district court erred in granting summary judgment on the issue of the monument itself being an Establishment Clause violation because it was not challenged in the appeal. *Id.* at 699.

96. *Id.* at 703-04.

97. *Id.* at 702-03.

98. *Id.* at 703.

99. *Id.* at 704.

100. *Id.* (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

101. *Id.* (citing *Lemon*, 403 U.S. at 612-13).

102. *Id.*

103. *Id.* at 705.

104. *Id.*

105. *Id.* at 702.

the City's desire to keep the Monument in its original location."¹⁰⁶ The sale itself did not have the primary effect of advancing or inhibiting religion because the City was trying to separate itself from any religious message while attempting to preserve the monument in its original location.¹⁰⁷ The court emphasized that the ruling from *Marshfield* dictated that these types of situations would be evaluated on a case-by-case basis¹⁰⁸ and did not mean that every sale would be automatically constitutional.¹⁰⁹

II. BACKGROUND AND HISTORY OF THE *BUONO* CASES

The history surrounding the *Buono* cross's site provides insight into why this cross is more than a religious symbol and therefore makes an Establishment Clause analysis more difficult. The background of the *Buono* site is key to understanding the similarities between the *Buono* cross and the religious monuments in *Marshfield* and *Mercier*. The procedural background of the *Buono* cases is also directly intertwined with congressional involvement with the site, further complicating analysis of the case.

A. *History and Description of the Site*

The Death Valley Post of the VFW erected a white cross on Sunrise Rock as a war memorial in 1934.¹¹⁰ The site is now part of the Mojave National Preserve (Preserve), but the VFW erected the cross sixty years before Congress created the Preserve.¹¹¹ This site was under the jurisdiction of the Bureau of Land Management until 1994.¹¹² The original cross was replaced several times, and the current cross dates from 1998.¹¹³ Historic photographs show signs near the original cross that stated: "The Cross, Erected in Memory of the Dead of All Wars," and "Erected 1934 by Members of Veterans of Foreign [sic] Wars, Death Valley post 2884."¹¹⁴ No signs are currently posted alongside the cross, but it is

106. *Id.* at 705.

107. *Id.*

108. *Id.* at 702 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 315 (2000)).

109. *Id.* ("We are not endorsing a non-remedial initiative designed to sell off patches of government land to various religious denominations as a means of circumventing the Establishment Clause.").

110. *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1205 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004). For an undated photograph of the cross taken by the National Park Service, see National Parks Traveler, <http://www.nationalparkstraveler.com/files/storyphotos/MOJA-Sunrise%20Rock%20Cross.jpg> (last visited Mar. 12, 2009).

111. *Buono I*, 212 F. Supp. 2d at 1204-05.

112. *Id.* at 1205. It is not apparent from available sources whether the federal government owned the land in 1934 when the VFW built the cross.

113. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

114. *Id.*

presumed that the originals likely deteriorated.¹¹⁵

The current cross is between five and eight feet tall and constructed of painted metal pipe four inches in diameter.¹¹⁶ It is visible from a road that passes through the Preserve and from a campground near the rock.¹¹⁷ The cross is currently bolted to the rock in order to make it difficult to remove.¹¹⁸ There is no plaque explaining that it is a war memorial and the government has never issued permits for reconstruction of this memorial.¹¹⁹ As early as 1935, the cross served as a site for Easter services, though these services occurred here regularly only since 1984.¹²⁰ The cross was arguably modeled after prominent World War I memorials such as the Argonne Cross in Arlington Cemetery.¹²¹

The cross sits on a small part of the 1.6 million-acre Preserve.¹²² While ninety percent of the Preserve, including the area surrounding the cross, is federally owned, 86,000 acres of the Preserve are privately-owned and 43,000 acres are owned by the State of California.¹²³ Privately-owned property is located near the cross; two ranches and several corrals are two miles away.¹²⁴

B. Procedural and Legislative History of the Buono Cases

The *Buono* controversy represents a check and counter-check between the Ninth Circuit and Congress. Between 1999 and 2007, there have been four court decisions, including *Buono IV*, ordering removal of the cross and four Congressional responses attempting to keep the cross in place.¹²⁵ The most recent conflict surrounding the cross concerned the validity of section 8121 of a defense appropriations bill (section 8121) that directed the transfer of the cross property to the VFW.¹²⁶

Controversy about the cross began in May 1999 after the National Park Service (NPS) received a letter requesting permission to erect a “stupa,” a dome-shaped Buddhist shrine, on a rock outcrop near the cross.¹²⁷ The NPS denied the

115. *Buono I*, 212 F. Supp. 2d at 1205.

116. *Id.*

117. *Id.*

118. *Buono IV*, 502 F.3d at 1072.

119. *Id.*

120. *Id.*

121. For additional discussion of the Argonne cross, see *infra* Part III.B.2. There is no explanation for why the VFW chose the cross form for the memorial.

122. *Buono I*, 212 F. Supp. 2d at 1205.

123. *Buono IV*, 502 F.3d at 1072.

124. *Buono v. Norton (Buono II)*, 371 F.3d 543, 550 (9th Cir. 2004).

125. *Buono IV*, 502 F.3d at 1073-76.

126. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121(a)-(f), 117 Stat. 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 (2006)).

127. *Buono I*, 212 F. Supp. 2d at 1205-06. The letter was sent by a “long-time acquaintance” of the plaintiff, Buono, which begs the question of whether the letter was sent in order to trigger litigation. *Id.* at 1206.

request, citing a federal regulation prohibiting installation of a memorial without its authorization, and added in a hand-written note that it intended to remove the cross as well.¹²⁸ In October 1999, the American Civil Liberties Union (ACLU) sent the NPS a letter expressing concern over the existence of the cross on federal land and threatening legal action if it was not removed.¹²⁹ The ACLU did not give the NPS a deadline to remove the cross, but the NPS was then confronted with how to remove the cross in the face of local opposition.¹³⁰ In August 2000, the ACLU contacted the NPS again and stated that it would sue unless the cross was removed within sixty days.¹³¹ Under threat of litigation, the NPS decided to remove the cross and subsequently contacted private citizens “believed to be responsible for maintaining the cross.”¹³² These individuals declined to remove the cross voluntarily and admitted that they would replace it if it was removed by the NPS.¹³³

The NPS’s decision to remove the cross prompted a county supervisor to contact Congressman Jerry Lewis (R-CA) with concerns about the removal of the “veteran’s memorial.”¹³⁴ What followed was the first of several congressional actions to save the cross. In December 2000, Congress passed the Consolidated Appropriations Act, a part of which stated that no government funds could be used to remove the cross. This effectively barred the NPS from following through with its plans to remove it.¹³⁵ The NPS did not remove the cross, and in March 2001, Frank Buono filed suit against the Secretary of the Interior, the Regional Director of NPS, and the Preserve’s Superintendent.¹³⁶ Buono, a former NPS employee at the Preserve and a Roman Catholic, claimed he was offended that a religious symbol was on federal land.¹³⁷

While this initial suit was pending in the District Court for the Central District of California, Congress passed its second bill related to the cross.

128. *Buono IV*, 502 F.3d at 1072-73. The regulation referred to in the letter states: “The installation of a monument, memorial, tablet, structure, or other commemorative installation in a park area without the authorization of the Director [of the NPS] is prohibited.” 36 C.F.R. § 2.62(a) (2008).

129. *Buono I*, 212 F. Supp. 2d at 1206.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* Congressman Jerry Lewis is the representative for the 41st congressional district of California. About Jerry Lewis, <http://www.house.gov/jerrylewis/bio.html> (last visited Mar. 12, 2009).

135. *Buono v. Norton (Buono II)*, 371 F.3d 543, 549 (9th Cir. 2004); *see also* Consolidated Appropriations Act of 2001, Pub. L. No. 106-554, § 133, 114 Stat. 2763 (2000).

136. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1073 (9th Cir. 2007), *amended and superseded on denial of reh’g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

137. *Buono I*, 212 F. Supp. 2d at 1207. While the ALCU is not a named plaintiff in this case, the ALCU provided legal representation for Buono. *Id.* at 1203.

Congress designated the cross as the “White Cross World War I Memorial” in January 2002¹³⁸ and directed the NPS to use funds for the Preserve to “acquire a replica of the original memorial plaque and cross.”¹³⁹ In July 2002, the district court ruled that the cross’s presence on federal land was a violation of the Establishment Clause because it failed the “effect prong” of the three-part *Lemon* test.¹⁴⁰ The court reasoned that the primary effect of the cross memorial was to advance religion.¹⁴¹

The district court in *Buono I* viewed the cross first and foremost as a religious symbol and determined that its origins as a war memorial did not “shield it from constitutional scrutiny.”¹⁴² Once the court decided that the effect prong of the *Lemon* test was not satisfied, it did not proceed to analyze the cross’s existence under the other two prongs.¹⁴³ The court granted *Buono*’s motion for summary judgment¹⁴⁴ and permanently enjoined the NPS from “permitting the display of the Latin cross” on Sunrise Rock in the Preserve.¹⁴⁵

Several months later in October 2002, Congress responded to the district court’s decision by including a provision in a defense appropriations bill forbidding the use of federal funds “to dismantle national memorials commemorating United States participation in World War I.”¹⁴⁶ After a motion to alter, amend, and stay the district court’s judgment was denied,¹⁴⁷ the NPS filed an appeal in December 2002 to the Ninth Circuit.¹⁴⁸ While the appeal was

138. Department of Defense and Emergency Supplemental Appropriations For Recovery From and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137(a), 115 Stat. 2230, 2278 (2002) (codified at 16 U.S.C. § 431 (2006)) (added to note listing national memorials). Congressman Lewis was chairman of the Defense Appropriations Subcommittee from 1999-2005, which explains how funds earmarked for the cross ended up in a defense bill. About Jerry Lewis, <http://www.house.gov/jerrylewis/bio.html> (last visited Mar. 12, 2009).

139. § 8137(c), 115 Stat. at 2278-79.

140. *Buono I*, 212 F. Supp. 2d at 1214-16. For additional discussion of the *Lemon* test, see *supra* Part I.A.1.

141. *Id.* at 1214-17 (citing *Lemon*, 403 U.S. at 612-13).

142. *Id.* at 1215 n.8. See also *Separation of Church & State Comm. v. City of Eugene (SCSC)*, 93 F.3d 617, 618 (9th Cir. 1996) (per curiam) (large cross designated as war memorial after its construction violated Establishment Clause). For more information on *SCSC*, see *supra* text accompanying notes 53-56.

143. *Buono I*, 212 F. Supp. 2d at 1215.

144. *Id.* at 1217.

145. *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1177 (C.D. Cal. 2005), *aff’d sub nom. Buono v. Kempthorne*, 502 F.3d 1069, 1071 (9th Cir. 2007) (quoting injunction order), *amended and superseded on denial of reh’g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

146. Department of Defense Appropriations Act, 2003, Pub. L. No. 107-248 § 8065(b), 116 Stat. 1519, 1551 (2002). This was Congress’ third act in relation to the cross.

147. Docket at 61, *Buono I*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002) (No. 5:01-CV-00216). Though this motion was denied, the court granted the defendants’ motion to stay judgment. *Id.*

148. Docket at 71, *Buono I*, 212 F. Supp. 2d 1202 (C.D. Cal. 2002) (No. 5:01-CV-00216).

pending, the NPS covered the cross with a tarp, and then a plywood box, in order to comply with both the injunction and the congressional acts.¹⁴⁹ The Ninth Circuit stayed the district court's injunction "to the extent that the order required the immediate removal or dismantling of the cross."¹⁵⁰

After oral arguments were presented, but before the Ninth Circuit issued a decision, Congress enacted a fourth bill with a provision regarding the cross.¹⁵¹ In section 8121 of a defense appropriations bill, several provisions outlined the transfer of the cross and one acre of surrounding land to the VFW in exchange for five acres of privately-owned land.¹⁵² When the Ninth Circuit issued its opinion ten months after oral arguments, it upheld the injunction.¹⁵³ The Ninth Circuit agreed with the district court's analysis of the cross under the *Lemon* test because of the similar analysis used in *SCSC*.¹⁵⁴ Even though Congress had already passed section 8121, the court declined to decide whether the proposed land transfer detailed in that bill was a violation of the Establishment Clause.¹⁵⁵ The land transfer proposal is evidence that the NPS and Congress likely thought that a transfer, similar to the one in *Marshfield*, would cure the Establishment Clause violation.

Once the land transfer for the cross began, Buono moved to enforce or modify the injunction in order to prevent the land swap from taking place.¹⁵⁶ In 2005, the district court responded to Buono's motion by ruling that the property transfer violated the permanent injunction against displaying the cross on government land and further enjoined the NPS from implementing any of the congressional acts related to the transfer.¹⁵⁷ In ruling that the sale was not allowed, the district court applied an analytical framework from *Marshfield*, which stated that unless there were "unusual circumstances," transferring a religious display on government property to a private party would be "an effective way . . . to end its inappropriate endorsement of religion."¹⁵⁸ The

149. *Buono III*, 364 F. Supp. 2d at 1177.

150. *Buono v. Norton (Buono II)*, 371 F.3d 543, 545 n.1 (9th Cir. 2004).

151. See Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121(a)-(f), 117 Stat. 1054, 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 (2006)).

152. § 8121(a)-(f), 117 Stat. at 1100.

153. *Buono II*, 371 F.3d at 546, 550.

154. *Id.* at 548-50 (citing *Separation of Church & State Comm. v. City of Eugene (SCSC)*, 93 F.3d 617 (9th Cir. 1996)). The cross in *SCSC* was also designated as a war memorial, but only after litigation began. *SCSC*, 93 F.3d at 618; see also *supra* text accompanying notes 53-56.

155. *Buono II*, 371 F.3d at 546 ("We express no view as to whether a transfer . . . would pass constitutional muster, but leave this question for another day.").

156. *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1176 (C.D. Cal. 2005), *aff'd sub nom. Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

157. *Id.* at 1182.

158. *Id.* at 1178 (quoting *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000)).

district court in *Buono III* found that unusual circumstances existed due to the abnormal nature of the transfer procedure and the reversionary property rights that the government retained once the transfer was complete.¹⁵⁹ The court also viewed NPS's transfer as an attempt to "evade" complying with the injunction's directive to stop displaying the cross.¹⁶⁰ Finding that unusual circumstances were present per *Marshfield*, the court declined to determine whether the land transfer itself was an independent violation of the Establishment Clause.¹⁶¹

C. Overview of Buono IV

In response to the district court's ruling regarding the proposed transfer of land, the NPS appealed to the Ninth Circuit on the grounds that the incomplete transfer was not ripe for judicial review and that the Establishment Clause would not be violated by the completed transfer.¹⁶² On September 6, 2007, the Ninth Circuit issued its decision upholding the district court's rulings in *Buono III*.¹⁶³ The court determined that pre-enforcement review of the transfer was permitted and that the transfer was ripe for review even though it was not completed.¹⁶⁴

The Ninth Circuit focused its analysis on the NPS's continuing oversight and reversionary interest, the land transfer process, and the history of the government's actions regarding preservation of the cross.¹⁶⁵ The NPS retained a reversionary interest in the property because the land transfer stipulated that if the cross site was no longer maintained as a war memorial, ownership would automatically revert back to the government.¹⁶⁶ The land exchange was unorthodox in that typically transfers of park land involve a public hearing and open bidding.¹⁶⁷ This seemed to indicate unusual involvement or circumstances per the framework in the Seventh Circuit's *Marshfield* analysis.¹⁶⁸ The circuit court also agreed with the district court's characterization of Congress' efforts to preserve the cross as "herculean," which served as additional indicators of "unusual circumstances."¹⁶⁹ Finally, the Ninth Circuit decided that the proposed

159. *Id.* at 1178-81.

160. *Id.* at 1182.

161. *Id.* at 1182 n.8.

162. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1077 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

163. *Id.* at 1069, 1071.

164. *Id.* at 1077-81.

165. *Id.* at 1082-85.

166. *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1179 (C.D. Cal. 2005), *aff'd sub nom. Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

167. *Buono IV*, 502 F.3d at 1084.

168. *Id.* at 1084-85.

169. *Id.* at 1085 (citing *Buono III*, 364 F. Supp. 2d at 1182).

transfer would not end the improper government action and, therefore, would constitute a violation of the permanent injunction.¹⁷⁰

III. DISSECTION OF ANALYSIS OF SALE IN *BUONO III* AND *BUONO IV*

In *Buono III* and *Buono IV*, the courts used the “unusual circumstances” test from *Marshfield* to analyze the sale.¹⁷¹ The courts’ analyses stopped there and did not apply the *Lemon* test as the Seventh Circuit did in *Marshfield* and *Mercier*.¹⁷² The Ninth Circuit also failed to analyze *Buono* using reasoning from *Van Orden*, which provided yet another alternative to the *Lemon* test.¹⁷³ In sum, the Ninth Circuit did not apply the “unusual circumstances” framework particularly well, considering the factual similarities between *Buono* and *Mercier*. Furthermore, the holes in the Ninth Circuit’s analysis illustrate that it failed to avail itself of other tests to either properly address whether the land transfer was an independent violation of the Establishment Clause or to come up with a proper remedy.

A. *Why the Land Transfer Failed the Marshfield “Unusual Circumstances” Framework in Buono III and Buono IV*

In *Buono III* and *Buono IV* the courts utilized the *Marshfield* analysis and found that unusual circumstances were present because of the unorthodox method of land transfer, the continuing government oversight of the memorial, and the history of the government’s efforts to preserve the memorial.¹⁷⁴

1. *Method of Land Transfer*.—The Secretary of the Department of the Interior is authorized by statute to exchange federal land for non-federal land under its jurisdiction.¹⁷⁵ Given that Congress “authorized [the land exchange] by a provision buried in an appropriations bill” (section 8121) and did not open it for bidding, the Ninth Circuit found unusual governmental involvement.¹⁷⁶ The Ninth Circuit also characterized the VFW as a “straw purchaser”¹⁷⁷ because a couple actively involved in efforts to maintain and preserve the cross owned the

170. *Id.* at 1085-86.

171. *Buono IV*, 502 F.3d at 1082-86; *Buono III*, 364 F. Supp. 2d at 1178-82.

172. *Buono IV*, 502 F.3d at 1086. The Ninth Circuit referred to *Buono II* in which the court previously determined that the cross itself was an endorsement of religion, but declined to discuss whether the sale itself was an endorsement. *Id.* (citing *Buono v. Norton (Buono II)*, 371 F.3d 543, 548-50 (9th Cir. 2004)).

173. *Van Orden v. Perry*, 545 U.S. 677, 686 (2005). See *supra* Part I.A.4.

174. *Buono IV*, 502 F.3d at 1082-86; *Buono III*, 364 F. Supp. 2d at 1178-1182. For explanation of the *Marshfield* framework, see *supra* text accompanying notes 59-60, 74.

175. 16 U.S.C. § 460l-22(b) (2006).

176. *Buono IV*, 502 F.3d at 1084-85.

177. A “straw man” is defined as “3. A third party used in some transactions as a temporary transferee to allow the principal parties to accomplish something that is otherwise impermissible.” BLACK’S LAW DICTIONARY 1434 (7th ed. 1999).

private land being exchanged for the memorial.¹⁷⁸ This combination of facts led the district court and Ninth Circuit to believe that the government was attempting to “circumvent” the injunction from *Buono I*.¹⁷⁹

In comparison to the factual situations in *Marshfield* and *Mercier*, the Ninth Circuit’s characterization of the sale seems flawed. In *Marshfield*, a group of private citizens came forward and offered to buy the Jesus statue from the city and no other bids were solicited.¹⁸⁰ In *Mercier*, the La Crosse city council voted five to three authorizing sale of the Ten Commandments monument to the Eagles, as permitted by state statute.¹⁸¹ Even though there were other interested buyers who offered to move the monument, the Seventh Circuit did not second-guess the council’s decision to sell it to the Eagles, whose headquarters were located across the street from the monument.¹⁸² The Ninth Circuit in *Buono IV* acknowledged that Congress’s actions alone were not dispositive in determining that the land transfer showed unusual circumstances; therefore, the state statute authorizing the sale of parkland in *Mercier* does not make the nature of the land transfer within that case radically different.¹⁸³

Furthermore, the fact that interested parties are willing to exchange their own land in order to preserve the memorial does not automatically mean that the VFW is a straw purchaser. While the plaintiffs in *Mercier* did not contend that the Eagles were acting as a straw purchaser, the Seventh Circuit reasoned that the Eagles were a logical choice for a buyer because they had “a long-standing and important relationship with the Monument.”¹⁸⁴ Similarly, the VFW had a long relationship with the cross memorial and seemed to be the most logical purchaser of the memorial property.¹⁸⁵ As in *Mercier*, the *Buono* cross would go to a party willing to care for the memorial.¹⁸⁶

2. *Continued Government Oversight.*—The district and circuit courts emphasized in *Buono III* and *Buono IV* that the continued oversight and involvement of the NPS with the memorial indicated that the VFW would not be taking on the traditional duties of ownership.¹⁸⁷ The district court in *Buono III*

178. *Buono IV*, 502 F.3d at 1085.

179. *Id.*

180. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 490 (7th Cir. 2000).

181. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 697 (7th Cir. 2005). Sale of parkland is permissible when “no longer required for [park] purposes.” WIS. STAT. ANN. § 27.08(2)(c) (West 2004).

182. *Mercier*, 395 F.3d at 696, 703.

183. *Buono IV*, 502 F.3d at 1084.

184. *Mercier*, 395 F.3d at 703.

185. *Buono IV*, 502 F.3d at 1084. The Ninth Circuit did not find this persuasive against its belief that unusual circumstances were present. *Id.* Cf. *Mercier*, 395 F.3d at 703, 705 (describing the Eagles as the “logical purchaser” of the monument).

186. *Buono IV*, 502 F.3d at 1084-85; *Mercier*, 395 F.3d at 703.

187. *Buono IV*, 502 F.3d at 1083-84; *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1179-81 (C.D. Cal. 2005), *aff’d sub nom. Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007),

stated that the continued oversight by the NPS and sale to the VFW (outlined in section 8121) demonstrated that the “apparent endorsement of a particular religion ha[d] not actually ceased.”¹⁸⁸ Part of the NPS’s statutory duties include “supervision, management, and control” of national memorials.¹⁸⁹ Accordingly, the Ninth Circuit determined that NPS duties in relation to the memorial would remain after the transfer was completed because the cross was designated a national memorial.¹⁹⁰ Nothing in section 8121, however, stipulates that NPS continue its role as caretaker solely because the cross is a national memorial.¹⁹¹ Not every national memorial is under government ownership. For example, Red Hill, the home of Patrick Henry, was designated a national memorial in 1986,¹⁹² but it is owned and managed by a private foundation.¹⁹³

While the statutory responsibilities of the NPS in relation to the memorial were important, the Ninth Circuit thought that a reversionary interest in the property outlined in section 8121 was even more indicative of the continual government control.¹⁹⁴ The transfer proposal was conditioned on the VFW’s agreement to

maintain the conveyed property as a memorial commemorating United States participation in World War I and honoring the American veterans of that war. If the Secretary determines that the conveyed property is no longer being maintained as a war memorial, the property shall revert to the ownership of the United States.¹⁹⁵

In regards to this reversionary interest, the Ninth Circuit stated that “it shows the government’s ongoing control over the property and that the parties will conduct themselves in the shadow of that control.”¹⁹⁶

While the reversionary clause in section 8121 is a greater property interest than the restrictive covenant in *Marshfield*,¹⁹⁷ the reversionary clause achieves

amended and superseded on denial of reh’g, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom.* Salazar v. Buono, No. 08-472, 2009 WL 425076 (Feb. 23, 2009); *Buono IV*, 502 F.3d at 1083-84.

188. *Buono III*, 364 F. Supp. 2d at 1180.

189. 16 U.S.C. § 2 (2006).

190. *Buono IV*, 502 F.3d at 1083-84.

191. See Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121, 117 Stat. 1054, 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 (2006)).

192. 16 U.S.C. § 431 (2006) (note listing Red Hill as a national memorial in 1986).

193. S.J. Res. 187 § 2, 99th Cong., 100 Stat. 429 (1986). See generally Red Hill—The Patrick Henry National Memorial, <http://www.redhill.org/rh/memorialfoundation.htm> (last visited Mar. 19, 2009).

194. *Buono IV*, 502 F.3d at 1083-84.

195. § 8121(e), 117 Stat. at 1100.

196. *Buono IV*, 502 F.3d at 1084.

197. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 492 (7th Cir. 2000). The restrictive covenant limited the use of the parcel to public park purposes. For discussion of the *Marshfield* facts, see *supra* Part I.C.1

a similar end of ensuring that the land be maintained for a particular purpose.¹⁹⁸ The focus of section 8121 is to transfer a war memorial, rather than a religious symbol.¹⁹⁹ The language was carefully crafted to refer to the property as a war memorial, and its cross form is not mentioned within the legislation.²⁰⁰ If the memorial's use changed to only a religious one, then congressional intent was that the land revert back to the NPS because the memorial would no longer be maintained.²⁰¹

When examining a statute, courts first examine whether the intent of Congress is clear, as evidenced by unambiguous language.²⁰² The Ninth Circuit, however, focused on a supposedly subversive and unwritten intent of this legislation—"evading" the injunction.²⁰³ Throughout its opinion, the court focused on Congress's efforts to preserve or maintain "the cross," seemingly brushing aside the monument's origins as a war memorial.²⁰⁴ However, as the government noted in its appellate brief, there is no requirement in section 8121 that the cross be displayed, so long as the property is maintained as a war memorial.²⁰⁵

As in *Marshfield*, it appears premature to address whether the reversionary clause is improper when the transfer has not been completed.²⁰⁶ It is not entirely clear what would happen to the cross if it were no longer maintained as a war memorial. It could be de-listed as a national memorial, but that is not expressly provided for in section 8121. If ownership reverted back to the NPS, the NPS would likely have to comply with the injunction by not displaying the cross. This means it could be covered with a box again if the previous statute still barred the use of government funding to remove it.

Both the district court and Ninth Circuit characterized the congressional act directing the NPS to install a replica of the original memorial and plaque as an

198. § 8121(e), 117 Stat. at 1100.

199. *Id.* § 8121(a), 117 Stat. at 1100.

200. *Id.* § 8121, 117 Stat. at 1100. *See also* Brief of Appellant at 14, *Buono IV*, 502 F.3d 1069 (9th Cir. 2007), No. 05-55852.

201. This is evidenced by the language of the statute. *See* § 8121(e), 117 Stat. at 1100.

202. *See* *Norfolk & W. Ry. Co. v. Am. Train Dispatchers Ass'n*, 499 U.S. 117, 128 (1991) ("As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. 'If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" (quoting *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984))).

203. *Buono IV*, 502 F.3d at 1085.

204. *See, e.g., id.*

205. Brief of Appellant, *supra* note 200, at 10. This is admittedly a weak argument, but the Ninth Circuit never seemed to show any deference to Congress or Congress's intent in section 8121.

206. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000). However, the Ninth Circuit determined that the proposed transfer was ripe for review even though it was not complete. *Buono IV*, 502 F.3d at 1077-81. This Note does not analyze the ripeness argument.

easement or license for a particular purpose.²⁰⁷ However, that Act predated section 8121 by two years²⁰⁸—there is no requirement in section 8121 that the plaque installation happen after the property is transferred to the VFW.²⁰⁹ The likely purpose of reinforcing this requirement in section 8121 was to ensure that Congress’s previous directives were carried out. Additionally, the NPS was probably barred from installing the plaque while the injunction remained in force.²¹⁰ Ensuring continuity between separate acts of Congress regarding the same property does not indicate an unusual circumstance under the *Marshfield* analysis.

3. *History of the Government’s Preservation Efforts.*—The district court in *Buono III* saw the series of congressional acts as evidence of “preserving the Latin cross” rather than the memorial.²¹¹ The court repeatedly focused on the form, rather than the function of the memorial. Granted, the cross is one of the primary symbols of Christianity. There is no explanation in the court documents as to why the sign for the cross was not replaced once it deteriorated, nor is it clear how well known the cross’s origins were to those who maintained it. The cross was erected as a memorial, as indicated by historical photographs.²¹²

Furthermore, the mission statement of the organization that erected the cross demonstrates its role as a war memorial. The VFW is a non-profit “organization of war veterans committed to ensuring rights, remembering sacrifices, promoting patriotism, performing community services and advocating for a strong national defense.”²¹³ This mission statement shows that there is not a religious aim to the

207. *Buono IV*, 502 F.3d at 1083 (citing Department of Defense and Emergency Supplemental Appropriations For Recovery From and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137(c), 115 Stat. 2230, 2278-79 (2002)). See also *Buono v. Norton (Buono III)*, 364 F. Supp. 2d 1175, 1180 (C.D. Cal. 2005), *aff’d sub nom. Buono v. Kempthorne*, 502 F.3d 1069 (9th Cir. 2007), *amended and superseded on denial of reh’g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

208. § 8137, 115 Stat. at 2278-79.

209. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121(a), 117 Stat. 1054, 100 (2003) (codified at 16 U.S.C. § 410aaa-56 (2006)).

210. The injunction barred the NPS from “permitting display of the Latin cross.” *Buono IV*, 502 F.3d at 1073. While installing a plaque is technically separate from displaying the cross itself, the district court would have likely thought the plaque installation was related to permitting display of the cross.

211. *Buono III*, 364 F. Supp. 2d at 1180.

212. *But see Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1215 n.8 (C.D. Cal. 2002), *aff’d*, 371 F.3d 543 (9th Cir. 2004) (listing cases where “a religious symbol’s official designation as a war memorial [did] not shield it from constitutional scrutiny”).

213. VETERANS OF FOREIGN WARS, VFW AT A GLANCE 1 (n.d.), *available at* <http://www.vfw.org/resources/pdf/glance.pdf> [hereinafter VETERANS OF FOREIGN WARS]. For additional background information on the VFW, see generally BILL BOTTOMS, *THE VFW: AN ILLUSTRATED HISTORY OF THE VETERANS OF FOREIGN WARS OF THE UNITED STATES* (1991); HERBERT MOLLOY MASON, JR., *VFW: OUR FIRST CENTURY* (1999).

organization, but rather a focus on veterans and veterans' rights.²¹⁴ When Congress chartered the VFW in 1936, one of the organization's enumerated purposes was "'to perpetuate the memory and history' of America's War dead."²¹⁵ The VFW played an important role in recovering soldiers' bodies after World War I, most notably participating in an expedition to northern Russia to recover eighty-six American soldiers.²¹⁶

Congress's repeated efforts to save the memorial may be abnormal but they do not mean that the "substance of the transaction as well as its form" indicate government action endorsing religion.²¹⁷ They also do not indicate "extraordinary circumstances that justify disregarding the sale for the purposes of endorsing religion."²¹⁸ The court in *Marshfield* declined to find extraordinary circumstances when assessing the transfer of a Jesus statue from City ownership to private ownership.²¹⁹ That statue had a far weaker link to a secular purpose than the cross in *Buono* does because the Jesus statue became part of a city rest area five years after it was donated to the city.²²⁰ While designation of the *Buono* cross as a national memorial happened during litigation, this was not the first time a commemorative purpose was connected to a cross movement.²²¹

The *Buono* cross's history as a memorial is also distinguishable from the facts in a recent Supreme Court decision, *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*.²²² In *McCreary*, two different Kentucky counties displayed the Ten Commandments within their respective courthouses in 1999.²²³ Shortly after the ACLU sued the counties, both counties put up expanded displays to explain that the Commandments were essentially the basis for Kentucky's laws and codes.²²⁴ In spite of an injunction, the counties expanded the displays in order to show that the Ten Commandments were the basis of American government.²²⁵ The Court found that the display of Ten Commandments in a courthouse had no secular purpose, other than those offered

214. VETERANS OF FOREIGN WARS, *supra* note 213, at 1.

215. MASON, *supra* note 213, at 92, 165.

216. *Id.* at 73-77.

217. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 491 (7th Cir. 2000).

218. *Id.* at 493.

219. *Id.* at 492-93.

220. *Id.* at 489.

221. *Cf. Murphy v. Bilbray*, 782 F. Supp 1420, 1437 (S.D. Cal. 1991), *aff'd sub nom. Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993) (discussing lack of evidence showing Mt. Soledad cross in San Diego was treated as a war memorial prior to litigation). *See generally* Jason Marques, Note, *To Bear a Cross: The Establishment Clause, Historic Preservation, and Eminent Domain Intersect at the Mt. Soledad Veterans Memorial*, 59 FLA. L. REV. 829 (2007).

222. 545 U.S. 844 (2005).

223. *Id.* at 851.

224. *Id.* at 852-53.

225. *Id.* at 854-57.

in response to litigation.²²⁶ While the Supreme Court stated that it typically accepted governmental statements of purpose for religious monuments or displays, when the purpose offered is an “apparent sham, or the secular purpose secondary,” then an obvious religious purpose will still overshadow the proffered secular one in the Court’s analysis.²²⁷

B. Using the New Approach from Van Orden

In 2005, the Supreme Court heard two cases concerning Ten Commandments monuments: *McCreary* and *Van Orden*.²²⁸ Although the Court applied the *Lemon* test in *McCreary*,²²⁹ a plurality of the Court in *Van Orden* stated that the *Lemon* test is “not useful” when assessing the “passive monument” at issue in that case.²³⁰ The Ten Commandments monument in *Van Orden* differed from the one in *McCreary*; the Fraternal Order of Eagles installed it on the Texas State Capitol grounds in 1961, and there are sixteen other monuments on the twenty-two acre site.²³¹ The Court stated when considering the *Van Orden* monument, its “analysis is driven both by the nature of the monument and by our Nation’s history.”²³² While this case did not address the transfer of property, it is instructive as a recent Supreme Court case discussing the Establishment Clause. Furthermore, this analysis results in a better consideration of the context of a monument than the *Lemon* test. If the Ninth Circuit had availed itself of this new approach when it decided *Buono IV*, the rational conclusion would have been that the *Buono* cross and proposed transfer did not violate the Establishment Clause.

1. *Nature of the Monument.*—Discussion in the plurality opinion of *Van Orden* focused on the nature of the monument both in the context of the Ten Commandment’s use by the government, and how it was used passively in this case.²³³ This decision was limited in scope to discussing the Ten Commandments, but it did differentiate that monument’s display from requirements that the Ten Commandments be displayed in schools.²³⁴ The Texas Capitol grounds monument was passive when compared to the school display cases because in the school cases, “the text confronted elementary school students every day.”²³⁵ The religious purpose of the monument in *Van Orden* was evident, but the Court affirmed the lower courts’ rulings that there was a valid secular purpose in Texas recognizing the Eagles’ (who had donated the

226. *Id.* at 866.

227. *Id.* at 865.

228. For additional information on *Van Orden*, see *supra* Part I.A.4.

229. *McCreary*, 545 U.S. at 864-66.

230. *Van Orden*, 545 U.S. at 686.

231. *Id.* at 681-82.

232. *Id.* at 686.

233. *Id.* at 690-92.

234. *Id.* at 691-92 (citing cases where such requirements were not upheld, *e.g.* *Stone v. Graham*, 449 U.S. 39 (1980) (*per curiam*)).

235. *Id.* at 691.

monument) efforts to fight juvenile delinquency.²³⁶

The Court would also likely see some validity in the preservation of the *Buono* cross as a war memorial. The VFW built the cross to honor dead soldiers from all wars,²³⁷ though Congress designated it as a World War I memorial.²³⁸ The *Buono* cross has fewer ties to the government than the *Van Orden* monument because no federal agency ever gave permission for the memorial to be built.²³⁹ While the Ninth Circuit focused on the form of the memorial as a cross,²⁴⁰ this part of the *Van Orden* analysis urges a more holistic view of a monument that looks beyond its form.

2. *Nation's History*.—The Court in *Van Orden* recognized that religion had a place in the history of the national government. The Court gleaned evidence of that history from discussions by the Framers and the presence of religious symbols throughout federal buildings and sites.²⁴¹ There is also evidence in American history that religious symbols were used in war memorial designs after World War I. For example, in Arlington National Cemetery, a thirteen-foot-tall marble cross honors World War I soldiers, some of whom died in the Argonne forest in France.²⁴² The Argonne Cross, erected in 1923,²⁴³ by the Argonne Unit of the American Women's Legion, specifically recognizes World War I soldiers reinterred in the cemetery after being disinterred from various cemeteries in Europe.²⁴⁴

Another large cross commemorates fallen World War I soldiers in Arlington.²⁴⁵ Dedicated on Armistice Day 1927, the Canadian Cross of Sacrifice honors American citizens who enlisted with the Canadian Armed Force because Canada entered World War I before the United States.²⁴⁶ The granite cross

236. *Id.* at 682-83.

237. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

238. Department of Defense and Emergency Supplemental Appropriations For Recovery From and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137(a), 115 Stat. 2230, 2278 (2002) (codified at 16 U.S.C. § 431 (2006) (added to national memorials list)).

239. *Buono IV*, 502 F.3d at 1072.

240. *See, e.g., id.* at 1071 (The opinion begins: "A Latin cross sits atop . . .").

241. *Van Orden*, 545 U.S. at 686-89.

242. GEORGE W. DODGE, *IMAGES OF AMERICA: ARLINGTON NATIONAL CEMETERY* 68 (2006).

243. OWEN ANDREWS, *A MOMENT OF SILENCE: ARLINGTON NATIONAL CEMETERY* 60 (1994).

244. JAMES EDWARD PETERS, *ARLINGTON NATIONAL CEMETERY: SHRINE TO AMERICA'S HEROES* 247-48 (1986). The British War Graves Commission, formed after World War I, planned cemeteries for dead soldiers in other countries, and one of the key features of these cemeteries was a large "Cross of Sacrifice." GEORGE L. MOSSE, *FALLEN SOLDIERS: RESHAPING THE MEMORY OF THE WORLD WARS* 82-84 (1990). The Cross design included a sword embedded within the cross, the blade facing downward. *Id.* at 83.

245. PETERS, *supra* note 244, at 248.

246. *Id.*

stands twenty-four-feet tall and features a bronze sword embedded within the cross.²⁴⁷ The memorial has been updated to honor additional veterans from World War II and Korea.²⁴⁸ These two crosses, constructed in Arlington National Cemetery in the 1920s, demonstrate that this was an accepted form of commemorating soldiers.

3. *Justice Breyer's Approach: Using Legal Judgment.*—Justice Breyer concurred in judgment in *Van Orden*, but elected to rely most heavily on “legal judgment” rather than tests for this type of “borderline” case involving religious text.²⁴⁹ Rather than looking to the nation’s history or the nature of the monument, Justice Breyer stated: “[T]o determine the message that the text [of the monument] here conveys, we must examine how the text is *used*. And that inquiry requires us to consider the context of the display.”²⁵⁰

One similarity between the memorials in *Buono* and *Van Orden* is their age and the length of time their presence went unquestioned.²⁵¹ The Ten Commandments monument in *Van Orden* was forty-four years old by the time the Supreme Court issued its decision.²⁵² Justice Breyer thought its “unchallenged” status was determinative, showing “that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect, primarily to promote religion over nonreligion.”²⁵³ Similarly, the *Buono* cross’s presence on the Preserve went undisturbed until the ACLU threatened litigation in 1999.²⁵⁴ An observer aware of the cross’s purpose as a war memorial would arguably not consider it an example of government furthering religion.²⁵⁵

The context of the monument in *Van Orden* is admittedly different than the *Buono* cross memorial at Sunrise Rock. The Ten Commandments monument in *Van Orden* is part of a larger complex of diverse monuments and historical markers.²⁵⁶ This variety also bolstered the state’s argument that this display

247. *Id.* at 249.

248. *Id.*

249. *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring).

250. *Id.* at 701 (emphasis in original).

251. *Id.* at 702. Justice Breyer stated: “As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner).” *Id.*

252. *Id.* at 682 (plurality opinion).

253. *Id.* at 702 (Breyer, J., concurring).

254. *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1205-06 (C.D. Cal. 2002), *aff’d*, 371 F.3d 543 (9th Cir. 2004).

255. *See Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005). *Cf. Buono v. Norton (Buono II)*, 371 F.3d 543, 550 (9th Cir. 2004) (a reasonable observer aware of the cross’s history would also be aware of government attempts to save it and the exclusion of other religious symbols).

256. *Van Orden*, 545 U.S. at 681.

showed Texas's political and legal history.²⁵⁷

In *Buono*, the cross is by itself and not located near any government buildings. The Ninth Circuit also found meaning in the NPS not allowing a Buddhist stupa to be erected in the Preserve.²⁵⁸ The context is much more isolated in *Buono*, and perhaps this would be enough for Justice Breyer to decide that this case is distinguishable from those at issue in *Van Orden*. In Justice Breyer's opinion, the isolated setting could make it more difficult for the government to extricate itself from the religious message attached to the cross memorial by selling it to the VFW and installing signs explaining the site's history. However, with this case now before the Supreme Court, the plurality opinion, rather than Justice Breyer's approach, would seem to indicate reversal of the Ninth Circuit's ruling in *Buono IV*.

C. Application of the Lemon Test to the Property Transfer of the Cross

The plurality opinion in *Van Orden* demonstrates that application of the *Lemon* test may not be necessary. However, because the Seventh Circuit applied the *Lemon* test in *Mercier* and *Marshfield*, it is surprising that the Ninth Circuit did not apply that test to the *Buono* sale.²⁵⁹ Instead, the court ended its review with the *Marshfield* "unusual circumstances" analysis.²⁶⁰ While the Ninth Circuit applied the *Lemon* test to the presence of the cross itself in *Buono II*,²⁶¹ its analysis in *Buono IV* focused on whether the sale would cure the Establishment Clause violation and only used the *Marshfield* analysis to reach the conclusion that such a sale would not cure the violation.²⁶² The Ninth Circuit further stated that the procedural posture of the case (and the proposed transfer) did not change its previous determination that the cross memorial was a government endorsement of religion.²⁶³ The *Lemon* test requires that every prong must be satisfied in order to survive judicial scrutiny: "State action violates the Establishment Clause if it fails to satisfy any of these prongs."²⁶⁴ However, analysis of the sale itself under the *Lemon* test demonstrates that each of the prongs are satisfied when the history and context of the *Buono* cross is considered.

1. *Secular Purpose*.—Neither the Ninth Circuit nor the district court discussed the secular purpose prong when evaluating the cross itself in *Buono I*

257. *Id.* at 691-92.

258. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1076 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

259. *Mercier*, 395 F.3d at 704-05; *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493-96 (7th Cir. 2000).

260. *Buono IV*, 502 F.3d at 1086.

261. *Buono v. Norton (Buono II)*, 371 F.3d 543, 548-50 (9th Cir. 2004).

262. *Buono IV*, 502 F.3d at 1081-86.

263. *Id.* at 1086 (citing *Buono II*, 371 F.3d at 548-50).

264. *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987).

and *Buono II* because the cross failed under the effect prong.²⁶⁵ However, based on discussion of the effect prong, it is unlikely that the Ninth Circuit would have found that the cross had a secular purpose, or at least not one that could overcome the religious nature of the cross itself.²⁶⁶ Nevertheless, the Ninth Circuit would be incorrect in finding that the cross (or the transfer of it) did not have a secular purpose when the facts of *Buono* are compared to those in *Mercier*.

In *Mercier*, the court looked at the connection between the Ten Commandments monument and its role in honoring those who helped the city of La Crosse during a flood.²⁶⁷ Before the monument was installed, young volunteers in the area worked hard to limit damage to the city during a spring flood by filling in excess of 51,000 sandbags.²⁶⁸ After dedication of the monument, a local paper reported that the monument was dedicated to those young volunteers.²⁶⁹ The Seventh Circuit distinguished the La Crosse monument from another Seventh Circuit Ten Commandments case in which a secular purpose was advanced only after litigation was imminent.²⁷⁰ The *Buono* cross was originally installed as a war memorial in 1934, and similar to *Mercier*, its secular purpose was clear when it was erected.²⁷¹ In addition to evaluating the monument itself, the court in *Mercier* focused on the secular motive of the sale: to separate the City from the monument in response to litigation.²⁷² Similarly, the transfer proposed in section 8121 was directly in response to the *Buono* litigation, based on the timing of the statute.²⁷³

2. *Primary Effect Advances or Inhibits Religion*.—While the “endorsement test”²⁷⁴ and “reasonable person” test²⁷⁵ are not part of the original *Lemon* test, the

265. *Buono II*, 371 F.3d at 550; *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1215 (C.D. Cal. 2002), *aff’d*, 371 F.3d 543 (9th Cir. 2004).

266. Only Judge O’Scannlain found that the large cross at issue in *SCSC* had a secular purpose as a war memorial, though he did agree with the majority that it would violate the effect prong. *Separation of Church & State Comm. v. City of Eugene (SCSC)*, 93 F.3d 617, 626 (9th Cir. 1996) (per curiam) (O’Scannlain, J., concurring). For more information on *SCSC* see *supra* text accompanying notes 54-56.

267. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 704-05 (7th Cir. 2005).

268. *Id.* at 696.

269. *Id.*

270. *Id.* 704-05 (citing *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2002)).

271. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded on denial of reh’g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

272. *Mercier*, 395 F.3d at 704-05.

273. Department of Defense Appropriations Act, 2004, Pub. L. No. 108-87 § 8121, 117 Stat. 1054, 1100 (2003) (codified at 16 U.S.C. § 410aaa-56 (2006)). Congress passed this Act after *Buono I* was decided.

274. *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O’Connor, J., concurring).

275. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778-80 (1995) (O’Connor, J., concurring).

Ninth Circuit discussed these tests along with the effect prong, and therefore they are included in the analysis of the effect prong.²⁷⁶ In discussing the effect prong of the *Lemon* test and formulating the endorsement test, Justice O'Connor stated: "The effect prong asks whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."²⁷⁷ Part of evaluating the effect of a particular action includes assessing the reaction of a reasonable person: "[A] reasonable observer 'must be deemed aware of the history and context of the community and forum in which the religious display appears,' including ownership of the land in question."²⁷⁸ While both of these definitions come from concurring opinions written by Justice O'Connor, they are also the definitions the district court and Ninth Circuit used in evaluating the effect prong in *Buono I* and *Buono II*.

The Ninth Circuit disregarded the notion that a sign explaining the origins of the cross as a war memorial would mitigate the Establishment Clause problem, even to a reasonable observer.²⁷⁹ The court stated that a reasonable observer would also know the legislative history related to the cross and perceive it as government preference for religion.²⁸⁰ However, the legislation started in 2000 when someone called Congressman Lewis and alerted him to removal of a "veteran's memorial."²⁸¹ When the cross became a national memorial in January 2002, this was a few short months after the September 11, 2001, terrorist attacks when patriotism was at a high level within the country.²⁸² Furthermore, other memorials, even one located in France, received funding in this appropriations bill.²⁸³

276. *Buono v. Norton (Buono II)*, 371 F.3d 543, 550 (9th Cir. 2004).

277. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring). This description of the effect prong was used by the district court in *Buono I*. *Buono v. Norton (Buono I)*, 212 F. Supp. 2d 1202, 1215 (C.D. Cal. 2002), *aff'd*, 371 F.3d 543 (9th Cir. 2004). See *supra* text accompanying notes 38-41.

278. *Buono II*, 371 F.3d at 550 (quoting *Capitol Square*, 515 U.S. at 780-81). See *supra* text accompanying notes 45-48 for additional background about *Capitol Square*.

279. *Id.* at 549 n.5 (citing *Separation of Church & State Comm. v. City of Eugene (SCSC)*, 93 F.3d 617, 626 (9th Cir. 1996) (per curiam) (O'Scannlain, J., concurring)).

280. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1085-86 (9th Cir. 2007) (citing *Buono II*, 371 F.3d at 548-50), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

281. *Buono I*, 212 F. Supp. 2d at 1206.

282. See, e.g., Michael Cooper, *A Nation Challenged: Patriotism; Two Months After the Attack, a Veterans Day Parade During Wartime*, N.Y. TIMES, Nov. 12, 2001, at B9. There is no evidence within the available legislative history that the 9/11 attacks specifically fueled the listing of this memorial, but part of the title of the appropriations bill was "Recovery From and Response to Terrorist Attacks." This shows what the primary motivation was for the Bill. Department of Defense and Emergency Supplemental Appropriations For Recovery From and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8137, 115 Stat. 2230, 2278 (2002) (codified at 16 U.S.C. § 431 (2006)).

283. See, e.g., § 8136, 115 Stat. at 2278 (codified at 42 U.S.C. § 429 (2006)) (benefiting Lafayette Escadrille Memorial in Marnes la-Coguette, France); Department of Defense and

The Ninth Circuit rightly noted in *Buono II* that the “Latin cross ‘is the preeminent symbol of Christianity.’”²⁸⁴ Judge O’Scannlain stated in his *SCSC* concurrence that the large cross in that case had a secular purpose as a war memorial, but still seemed to endorse religion because of its form.²⁸⁵ The court in *Buono II* did not find *Buono* distinguishable from *SCSC*, even though the *Buono* cross was erected as a war memorial and the *SCSC* cross was designated as a memorial several years after its construction.²⁸⁶ Even though Easter services have occurred at the cross, the decisions of private individuals to use this site for religious worship should not dictate an Establishment Clause violation.²⁸⁷

When analyzing the transfer in *Buono IV*, the court used the analysis from *Marshfield*, but failed to state how this cross was different than the Jesus statue at issue in that case.²⁸⁸ While the Ninth Circuit is obviously not bound to follow Seventh Circuit decisions, this omission seems to indicate that the court was picking and choosing its analysis without considering the entire context of the preceding cases. The Seventh Circuit discussed the restrictions on the government limiting religious free speech, even though in *Marshfield* the issue was private religious speech in a public forum.²⁸⁹ This concern was not mentioned in any of the *Buono* decisions. The Seventh Circuit recognized that the *Marshfield* Jesus statue “create[d] the perception of government endorsement in a reasonable observer,” but this perception could be cured with a narrow remedy using a fence and signage.²⁹⁰ This begs the question of how the Ninth Circuit used the same analysis from *Marshfield*, but did not come to a similar conclusion that transferring (and properly marking) the property ended the Establishment Clause violation. This is particularly vexing considering the secular history of the cross compared to the history of the Jesus statue in *Marshfield*.²⁹¹

The Seventh Circuit’s conclusion in *Mercier* is the opposite of the Ninth

Emergency Supplemental Appropriations For Recovery From and Response to Terrorist Attacks on the United States Act, 2002, Pub. L. No. 107-117, § 8138, 115 Stat. 2230, 2279 (codified at 16 U.S.C. § 431 (2006)) (allocating \$4.2 million to benefit the U.S.S. Alabama Battleship Foundation, an organization that preserves the ship’s memorial and museum).

284. *Buono II*, 371 F.3d at 545 (quoting *Buono I*, 212 F. Supp. 2d at 1205).

285. *Separation of Church & State Comm. v. City of Eugene (SCSC)*, 93 F.3d 617, 626 (9th Cir. 1996) (per curiam) (O’Scannlain, J., concurring). See *supra* text accompanying notes 54-56 for additional background.

286. *Buono II*, 371 F.3d at 548-50.

287. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1072 (9th Cir. 2007), *amended and superseded on denial of reh’g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

288. *Id.* at 1081-85.

289. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 493 (7th Cir. 2000) (citing *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993)).

290. *Id.* at 495, 497.

291. *Id.* at 489. The Jesus statue was a part of a rest area and even bears the inscription: “Christ Guide Us On Our Way.” *Id.*

Circuit's. In *Mercier*, the court determined that a reasonable observer aware of all of the history of the monument, the City's efforts to divest itself of the monument, and its location away from any seat of government would not believe that the sale of the monument itself advanced religion.²⁹² The court clearly stated: "[T]he sale of the property did not have the 'primary or principal effect of advancing a religion.'"²⁹³

3. *Excessive Entanglement with Religion*.—This prong was not addressed in *Buono I* (and consequently *Buono II*) because the effect prong failed the *Lemon* test. Therefore, it is not clear how the Ninth Circuit would have evaluated this prong. In *Mercier*, the court did not address this prong because neither of the parties asserted that it failed.²⁹⁴

In evaluating the *Buono* transfer, it is doubtful that it would fail this prong of the test, or that *Buono* would argue that there is an excessive entanglement with religion. The government is trying to separate itself from the war memorial and sell it to a secular non-profit organization. The NPS's minimal involvement with the monument continues only because of its status as a war memorial, not because the monument is a religious site.

D. The Proper Remedy?

One key difference between *Marshfield* and *Buono* is that the *Marshfield* court remanded the case to the district court to find a narrowly tailored remedy that would not require removal of the statue.²⁹⁵ It stated that the options were to either estop a private group's expression of religious speech on its own land (ostensibly by removing the Jesus statue) or to differentiate between property owned by the memorial fund and the City.²⁹⁶ The court further stated that "[t]he latter—not the former—is the appropriate solution."²⁹⁷

In comparison, the Ninth Circuit all but ridiculed Congress for "carving out a tiny parcel of property in the midst of this vast Preserve—like a donut hole with the cross atop it."²⁹⁸ Furthermore, the Ninth Circuit did not offer NPS an

292. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 705 (7th Cir. 2005). *But see id.* at 706 (Bauer, J., dissenting) (comparing monument's disclaimer that City is not endorsing religion to the wizard in *The Wizard of Oz* who "directs the onlookers to 'pay no attention to that man behind the curtain'").

293. *Id.* at 705 (majority opinion) (quoting *Books v. City of Elkhart*, 235 F.3d 292, 304 (7th Cir. 2002)).

294. *Id.* at 704.

295. *Freedom from Religion Found., Inc. v. City of Marshfield*, 203 F.3d 487, 497 (7th Cir. 2000).

296. *Id.*

297. *Id.*; see also Jordan C. Budd, *Cross Purposes: Remedying the Endorsement of Symbolic Religious Speech*, 82 DENV. U. L. REV. 183, 230-31 (2004) (discussing instances when it is not appropriate to remove a prominent monument or symbol in order to avoid "private religious strife").

298. *Buono v. Kempthorne (Buono IV)*, 502 F.3d 1069, 1086 (9th Cir. 2007), *amended and superseded on denial of reh'g*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v.*

opportunity to rework the deal in a way that could stipulate clear demarcation of the cross memorial and less government involvement. Alternatively, the court could have allowed the land transfer to go forward and outlined what the NPS could do if ownership of the site (and the cross) reverted to the federal government. *Buono* involves both a larger public park and a different degree of government involvement (through the succession of congressional acts) than seen in *Marshfield*.²⁹⁹ Nevertheless, it seems that reasonable judicial discretion would have involved stipulating what could be a constitutionally acceptable solution, or at least to give more guidance for future cases. Instead, the Ninth Circuit's stance appears to be that any religious symbol, regardless of its purpose, is a violation of the Establishment Clause.

CONCLUSION

The *Buono* Memorial is probably still standing on Sunrise Rock, though it is likely still covered by a plywood box. The Ninth Circuit denied the government's petition for a rehearing *en banc* on May 14, 2008.³⁰⁰ A majority of judges voted not to rehear the case, but Judge O'Scannlain wrote a lengthy dissenting opinion that was joined by four other judges in the Ninth Circuit.³⁰¹ Judge O'Scannlain highlighted several deficiencies within *Buono IV*, stating that the decision deviates from Supreme Court precedent, "creates a split with the Seventh Circuit on multiple issues, and invites courts to encroach upon private citizens' rights under both the speech and religion clauses of the First Amendment."³⁰² His opinion, along with the clear split between the Seventh and Ninth Circuits on how to evaluate the sale of land in response to an Establishment Clause violation, might help explain why the Supreme Court granted the government certiorari.³⁰³ Until the Supreme Court substantively addresses these discrepancies, Establishment Clause jurisprudence will remain foggy. There is no clear guidance as to how an Establishment Clause violation can be cured when monuments are involved, short of the monument's removal.

The Ninth Circuit did not adequately perform an independent assessment of whether the NPS's transfer of the *Buono* Memorial to a local chapter of the VFW cured the Establishment Clause violation. While the Ninth Circuit was primarily concerned with whether the proposed transfer violated the 2002 injunction, it

Buono, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

299. *Id.* at 1072-77.

300. *Buono v. Kempthorne (Buono V)*, 527 F.3d 758, 759-60 (9th Cir. 2008). The court denied the petition after rewording part of footnote 13 within the *Buono IV* opinion, which discussed *Marshfield*. *Id.*

301. *Id.*

302. *Id.* (O'Scannlain, J., dissenting). This Note was finalized prior to publication of Judge O'Scannlain's opinion, but his dissent in *Buono V* criticizes many of the same issues discussed within this Note. *See id.* at 760-68. However, Judge O'Scannlain did not discuss why the court in *Buono IV* did not apply the *Lemon* test.

303. *Salazar v. Buono*, No. 08-472, 2009 WL 425076 (Feb. 23, 2009).

seemed to rest its analysis largely on its previous determination that the symbol itself was a violation, without considering any alternatives to ending the violation.³⁰⁴ By contrast, in *Mercier*, both the “unusual circumstances” analysis and *Lemon* test were applied to evaluating the monument or religious symbol transfer. The Ninth Circuit also did not apply reasoning used by the plurality in *Van Orden*, which gave the court an alternative method of evaluating Establishment Clause cases.

The *Buono IV* decision further highlights a troubling tension between Congress and the Ninth Circuit. The court jumped to the conclusion that Congress acted unconstitutionally in authorizing the sale by assuming the aim of Congress was to avoid the *Buono I* injunction.³⁰⁵ However, courts typically like to avoid constitutional determinations if at all possible: “It is well settled that this Court will not pass on the constitutionality of an Act of Congress if a construction of the statute is fairly possible by which the question may be avoided.”³⁰⁶

As *Mercier* and *Marshfield* illustrate, a court can find a solution to an Establishment Clause violation that does not require removal of the monument or religious symbol. Establishment Clause jurisprudence is admittedly muddled, but by diverting sharply from the Seventh Circuit in *Marshfield* and *Mercier*, the Ninth Circuit has made matters worse with its ruling in *Buono IV*. A review of *Buono IV* provides a good opportunity for the Supreme Court to address whether sale of property is a proper remedy for an Establishment Clause violation. Selling government property is not always the answer.³⁰⁷ The Seventh Circuit’s opinions certainly did not advocate selling off property to end a violation: “We are not endorsing a non-remedial initiative designed to sell off patches of government land to various religious denominations as a means of circumventing the Establishment Clause.”³⁰⁸ However, property transfers provide an opportunity to maintain certain secular memorials and respect their place in history in spite of any allied religious overtones.³⁰⁹

304. *Buono IV*, 502 F.3d at 1085-86; see also *Buono V*, 537 F.3d at 763 (O’Scannlain, J., dissenting) (“[T]he *Buono IV* opinion . . . has bestowed upon judges the extraordinary authority to enjoin private parties from displaying religious symbols on their own land *based solely on the government’s pre-divestment conduct*, absent any showing that the government would remain ‘intimately involved’ in the care and maintenance of privately-owned land.” (emphasis added)).

305. *Buono IV*, 502 F.3d at 1086.

306. *United States v. Clark*, 445 U.S. 23, 27 (1980).

307. See *Buono V*, 527 F.3d at 764 (O’Scannlain, J., dissenting).

308. *Mercier v. Fraternal Order of Eagles*, 395 F.3d 693, 702 (7th Cir. 2005).

309. See *id.* at 705 (“A reasonable person, considering the history of the monument . . . would understand the City’s desire to keep the [Ten Commandments] Monument in its original location.”); see also *id.* at 702 (“The desire to keep the Monument in place cannot automatically be labeled a constitutional violation. Removal is . . . not a necessary solution.”).

YES IN MY BACKYARD: DEVELOPERS, GOVERNMENT AND COMMUNITIES WORKING TOGETHER THROUGH DEVELOPMENT AGREEMENTS AND COMMUNITY BENEFIT AGREEMENTS

STEVEN P. FRANK*

INTRODUCTION

The modern real estate development approval process requires a developer to have more than knowledge of the traditional zoning system in order to successfully obtain approval for his projects.¹ A range of concerns have found a voice in the zoning process, yielding an equally broad range of zoning strategies and exceptions.² Added to the growing number of concerns addressed in zoning regulation is the greater scope and complexity of modern development projects. Complex modern land use developments, such as major urban renewal “New Urbanism” projects, are key to the future success of many cities, and push traditional zoning regulations to their limits.³

While the zoning application process still provides the backdrop for modern developments, direct negotiations between developers and local government are growing in prominence as a means of dispute resolution.⁴ However, when negotiations cover decisions that are ultimately subject to a regulatory process,

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1. Traditional zoning is often referred to as Euclidean zoning, so called for the U.S. Supreme Court decision of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), that upheld a zoning ordinance which imposed strict building regulations. *Id.* The original purpose of Euclidean zoning was to control the rapid growth of urban areas at the start of the twentieth century. 1 ARDEN H. RATHKOPF ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING §§ 1:5 (4th rev. ed. 2007). As the century progressed, urban areas declined and revitalization of urban cores grew in prominence, leading to a modern system of zoning that rules as much by exception as it does by restrictive rule. *Id.* §§ 1:5, 1:13-1:14.

2. New zoning strategies are constantly arising to address an ever-growing list of concerns. Examples include such disparate concerns as inclusionary zoning, wetlands preservation zoning, and solar access zoning. *See id.* § 1:13.

3. New Urbanism is a movement by planners, architects and developers to design new multi-use projects which evoke the dense, pedestrian-friendly small town centers and city neighborhoods of the pre-World War II United States. Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783, 783-84 (2003).

4. For examples of alternative approaches to land use disputes, see generally Jonathan M. Davidson & Susan L. Trevarthen, *Land Use Mediation: Another Smart Growth Alternative*, 33 URB. LAW. 705 (2001).

concerns arise regarding the constitutionality of the deals made.⁵ Developers must also appease the varying political influences on local government so as to ensure that a shift in the political winds does not sink the project.⁶ Finally, even if developers manage to successfully steer their projects through the maze of constitutional, regulatory and political problems associated with development negotiation, there is still a chance that the deals will fall through due to pressure from local NIMBY (not in my backyard) syndrome.⁷ NIMBY syndrome is especially common with large urban developments, such as airports and sports stadiums, that provide broad benefits to the community but disproportionately impact a specific area.⁸

Resolving the conflicting interests of developers, the local government, and the community requires approaches that go beyond the standard zoning approval format of application, board hearing, and appeal. Developers and communities have attempted various methods, the most successful of which is a statutory method known as development agreements. Development agreements may solve many of the constitutional problems posed by other methods.⁹ However, development agreements and other prominent land use negotiation tools are largely a partnership between the developer and local government, leaving community interests without sufficient involvement.¹⁰ When deals are negotiated solely between a developer and local government, there remains a significant chance that any settlement will be derailed by local residents who are angry over their lack of inclusion in the process. The bitter nature of most NIMBY disputes leads to a breakdown of the development approval process, as politicians faced with entrenched opposition are likely to take a protectionist stance regarding the neighborhoods they represent.¹¹ To truly combat the NIMBY syndrome,

5. See *infra* Part II. For a more detailed analysis of the constitutional problems raised by public-private partnerships in land use zoning agreements, see generally David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351, 361-65 (2007).

6. See Barak D. Richman, Student Article, *Mandating Negotiations to Solve the NIMBY Problem: A Creative Regulatory Response*, 20 UCLA J. ENVTL. L. & POL'Y 223, 223-24 (2001-2002).

7. *Id.* NIMBY, or "not in my backyard," syndrome refers to the negative response to large developments by the surrounding community. *Id.* at 223. No matter how beneficial a project may be, there is always someone who is unhappy with the result. See *id.* at 223-25.

8. See *id.*

9. See *infra* Part III.B. For more thorough examinations of development agreements and the issues associated with such agreements, see Callies & Sonoda, *supra* note 5, at 380-408; Shelby D. Green, *Development Agreements: Bargained-For Zoning that is Neither Illegal Contract nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 392-400 (2004).

10. David A. Marcello, *Community Benefit Agreements: New Vehicle for Investment in America's Neighborhoods*, 39 URB. LAW. 657, 660-61 (2007) (citing Barbara L. Bedzek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 59 (2006)).

11. See Richman, *supra* note 6, at 224.

developers and local government must find a way to bring community organizations into the negotiations as a central participant, not as an afterthought.¹²

In recent years, concerns over the lack of community involvement in development negotiations—and a fear of the consequences—have led some developers to consider community benefit agreements, a new development tool propounded by coalitions representing a broad range of the local community in order to receive concessions directly from the developers.¹³ In exchange for benefits to the community, the coalition agrees to support the developer's project and pressure the local government for favorable rulings and funding.¹⁴ Not only do these agreements provide significant benefits to the community, but the developer benefits by securing political support for what might have otherwise been a contentious project. By incorporating community benefit agreements into more traditional negotiation tools such as development agreements, the potential arises to solve many of the lingering problems found in development negotiations.

This Note proposes the combined use of development agreements with community benefit agreements to solve some of the lingering problems in land use negotiations. Part I describes the current state of land use negotiation and the problems developers face when attempting to negotiate land use agreements. The discussion begins with a description of the shortcomings of regulatory zoning as a method of resolving disputes over complex development projects. Part II addresses the constitutional issues that arise when attempting to negotiate deals involving the regulatory zoning system. Part III discusses the dominant approaches to development negotiations—conditional zoning and development agreements—and addresses both their merits and deficiencies. Part IV introduces community benefit agreements, discusses the origin of these agreements, their benefits, limitations, and their possible use as a solution to many of the lingering concerns in development negotiations, including NIMBY syndrome. This Note concludes with a call for a wider adoption of development agreements and an inclusion of community benefit agreements in development negotiations.

I. THE NEED FOR NEGOTIATED LAND USE AGREEMENTS AND THE SHORTCOMINGS OF EUCLIDEAN ZONING

Euclidean zoning has been the dominant framework for development in the

12. *See id.* at 224-25.

13. *See* Marcello, *supra* note 10, at 657-61 (explaining what a community benefit agreement is and what factors exist in driving the need for community benefit agreements); Patricia E. Salkin, *Understanding Community Benefit Agreements: Opportunities and Traps for Developers, Municipalities and Community Organizations*, American Law Institute-American Bar Association Continuing Legal Education, Aug. 16-18, 2007, available at SN005 ALI-ABA 1407.

14. *See* Marcello, *supra* note 10, at 658-60.

United States since World War I.¹⁵ The system was originally designed to provide for a strict delineation of land uses in the planning of communities.¹⁶ However, over time traditional Euclidean zoning has been modified with numerous exceptions, which led to a system that now zones largely by exception to the rule, rather than strict adherence to segregated zones.¹⁷ Euclidean zoning has also created its own problems, chief among these being excessive sprawl in metropolitan areas.¹⁸ Modern developers now face new problems not foreseen at the time of Euclidean zoning's adoption, and have turned to new methods of development approval in order to ensure their complex projects are not defeated by the overly rigid system of zoning classification.

A. *The Evolution of Euclidean Zoning*

Euclidean zoning power is derived from the state's inherent police powers (i.e., the power to protect the public health, safety, and general welfare).¹⁹ This power of the sovereign state is generally delegated to local government to enforce through enabling statutes or state constitutional provisions.²⁰ The classical model of zoning provided only for rigid categorization and has largely been replaced by more flexible options so as to enforce the goals of zoning in the face of unforeseen challenges.²¹ The need for more flexible zoning regulations arose in part due to the promotion of concepts such as urban renewal, smart growth initiatives which call for greater urban densities to combat sprawl, and multi-use developments.²² More flexible zoning options, such as variances and special use permits, have become a core part of modern zoning, allowing local governments to fill the need for individualized, non-conforming land uses which would not be possible under the more rigid traditional zoning scheme.²³

Euclidean zoning became one of the major defining factors of American postwar growth.²⁴ The sprawling growth encouraged by Euclidean zoning led to the decline of the traditional urban commercial core as the center of metropolitan areas.²⁵ Instead, suburban commercial nodes are now the destinations for most

15. James H. Wickersham, Note, *The Quiet Revolution Continues: The Emerging New Model for State Growth Management Statutes*, 18 HARV. ENVTL. L. REV. 489, 492-96 (1994).

16. *Id.* at 494.

17. See 1 Zoning and Land Use Controls (MB) § 5.01[1] (Damien Kelly ed., 2008).

18. See Wickersham, *supra* note 15, at 494-96.

19. 6 Zoning and Land Use Controls, *supra* note 17, § 35.02[3].

20. *Id.* § 35.03[2]-[3].

21. See *id.* § 5.01[1].

22. For some discussion on the merits of new, flexible zoning alternatives in aiding these projects, see Michael B. Kent, Jr., *Forming a Tie that Binds: Development Agreements in Georgia and the Need for Legislative Clarity*, 30 ENVIRONS ENVTL. L. & POL'Y J. 1, 3-7 (2006); Wickersham, *supra* note 15, at 507-48.

23. 1 Zoning and Land Use Controls, *supra* note 17, § 5.01[1].

24. See Wickersham, *supra* note 15, at 494-96.

25. *Id.*

commuters.²⁶ The zoning system's use as an efficient means for rapid growth has often come at the expense of sustainability, environmental destruction and quality-of-life concerns.²⁷

B. Current Limitations of Euclidean Zoning

Combating the problems caused by Euclidean zoning is a very difficult task to perform within the traditional zoning system. Euclidean zoning was primarily designed to create low-density, small-scale development.²⁸ This goal is reflected in the Standard Zoning Enabling Acts (SZEAs) adopted subsequent to the *Euclid* decision.²⁹ The goal of SZEAs is to provide development consistent with a community's comprehensive plan.³⁰ Because this system envisions each zone containing only properties for specific uses, large-scale developments often require special mechanisms which go beyond the SZEAs limitations.³¹ Other inherent limitations in the zoning system prevent the cooperation and foresight needed to develop smart growth strategies.³² These limitations include a lack of broader planning to tie together specific zoning districts, and a lack of cooperation between zoning authorities in politically fractionalized metropolitan areas.³³ Often this lack of a unified strategy leads to a lack of foresight regarding the "spillover" effects a large development might have on surrounding towns.³⁴

To combat the problems created by Euclidean zoning, many communities turn to large, mixed commercial and residential use projects.³⁵ These projects are designed to promote smart and sustainable growth by creating entirely new communities based upon the small town centers and city neighborhoods that dominated development prior to Euclidean zoning.³⁶

Yet these projects face additional hurdles because of the size and scope of

26. *Id.*

27. *Id.*

28. *Id.* at 494-97.

29. See 6 Zoning & Land Use Controls, *supra* note 17, § 37.03[1].

30. *Id.*

31. One method of dealing with large developments within Euclidean zoning is the "Planned Unit Developments" (PUDs) exception. *Id.* PUDs set broad density and use type requirements for a project, but allow developers discretion in the placement of individual units within that project. *Id.* This relaxed zoning management style illustrates how many modern zoning approaches have only the barest relation to the original lot-by-lot style of administration of Euclidean zoning. See *id.* However, while PUDs are more flexible than traditional zoning, local governments are often unwilling to give PUDs the broad scope necessary to combat some of the most fundamental problems created by inflexible zoning patterns. See Ohm & Sitkowski, *supra* note 3, at 785-86.

32. See Wickersham, *supra* note 15, at 498-99.

33. *Id.*

34. *Id.* at 503.

35. Lynn E. Blais, *Urban Revitalization in the Post-Kelo Era*, 34 FORDHAM URB. L.J. 657, 683 (2007).

36. See Ohm & Sitkowski, *supra* note 3, at 783-84.

these developments.³⁷ Developers of large-scale projects face numerous challenges—from complex regulatory approval processes to the equally complex task of organizing contractors, lenders, and other players necessary for a successful completion of the project.³⁸ Such broad coordination takes time, and the longer a project takes to develop, the greater the chance that political and market forces will turn against the project, grounding it before construction can even begin.³⁹ Variances and special use permits can provide relief from existing zoning conflicts, but cannot prevent future changes to applicable zoning regulations. Developers faced with a long-term project seek assurances that zoning regulations enforced upon the development will not be changed in the middle of construction.⁴⁰ Such assurances are not easily obtained, as political shifts within the local government may lead to rezoning or curtailment of permissions granted to a developer.⁴¹ Granting a large urban development any significant abatements from zoning regulation is likely to have more than a fair share of detractors, and when faced with public opposition, the public approval process is likely to fall apart as politicians choose politically safe neighborhood protection over development.⁴²

Local governments also face hurdles when approving large, multi-use projects. Such projects require long-term political support, usually over the course of multiple administrations.⁴³ Funding for infrastructure improvements related to developments is also scarce; for example, federal funding for local infrastructure has long been on the decline.⁴⁴ Cash-strapped local governments have been forced to add increasingly high impact fees to new developments, a cost which is often passed on to new home buyers by the developer.⁴⁵

To overcome these obstacles, modern zoning decisions are now often made by local governments working in direct negotiations with individual developers.⁴⁶

37. One difficulty facing large mixed-use developments which is not discussed in this Note is the impact of *Kelo v. City of New London*, 545 U.S. 469 (2005), and subsequent state legislation on the use of eminent domain as a tool for facilitating smart growth and urban renewal. For a discussion of the effects of post-*Kelo* eminent domain legislation for smart growth and urban renewal on large, mixed-use projects, see generally Blais, *supra* note 35 (discussing *Kelo*'s arresting effect on ongoing urban development and revitalization projects and the associated legislative responses).

38. Green, *supra* note 9, at 383.

39. *Id.* at 390.

40. *See id.*

41. *Id.* at 389-90.

42. Richman, *supra* note 6, at 224.

43. *See* Kent, *supra* note 22, at 5-7.

44. *See* Callies & Sonoda, *supra* note 5, at 354.

45. Such fees disproportionately affect the housing market. For example, impact fees added an average of \$24,325 to the cost of a new home in California in 1999. *Id.* at 371.

46. *See* Green, *supra* note 9, at 389-90. Some commentators have even gone as far as to call for a complete replacement of the piecemeal zoning variance system with mediation. *See* Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL.

Direct dealing between local government and developers offers a number of advantages over pure Euclidean zoning.⁴⁷ Yet if such dealings are not checked by a regulatory system and public scrutiny, the risk for inefficiency and abuse is profound.⁴⁸ Thus, a public-private partnership between local government and developers must be contractual in nature yet still incorporate the traditional zoning process.⁴⁹ As discussed in the next Part, the dual contractual-regulatory nature of this partnership creates new constitutional hurdles to land use development.

II. THE CONSTITUTIONAL PROBLEMS FACING LAND USE AGREEMENTS

Historically, several constitutional issues limited the scope of direct negotiations between local governments and private parties over possible legislative action. These included concerns over the government's ability to contractually limit its actions and concerns about the limitations on exactions that government may impose upon parties seeking legislative action.⁵⁰ These limitations are well defined by the Supreme Court, and other than exactions concerns, the constitutional concerns regarding public-private agreements have largely been resolved. However, before discussing the current methods for enabling public-private agreements in zoning negotiations, a look at the concerns that led to their development is appropriate.

A. *The Contract Clause*

The Contract Clause of the U.S. Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."⁵¹ A literal reading of the Contract Clause would prevent government from passing any laws that

L. REV. 837, 887-93 (1983).

47. There are numerous benefits to direct dealing between local government and developers: [Direct dealing] allows for individualized decisions that take into account the unique features of a particular parcel or project and the availability of measures capable of mitigating adverse land use effects. A carefully tailored set of land use requirements based on a bargaining process may be fairer than traditional regulation: rather than simply treating roughly similar land equally, it takes into account specific characteristics and problems that justify variations from a potentially overbroad norm. Furthermore, the bargaining process may be more efficient because it facilitates cost-efficient outcomes and substitutes a potentially cheaper decisionmaking process that fosters prompt and amicable compromises while avoiding the costs attendant to protracted administrative and judicial appeals.

Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 960 (1987).

48. *Id.* at 960-61.

49. *Id.* at 963-65.

50. Callies & Sonoda, *supra* note 5, at 356-60, 381-87.

51. U.S. CONST., art I, § 10, cl. 1.

would impair the execution of obligations found in contracts in which the Government is a party.⁵² Yet the Contract Clause is not a literal bar to all government actions, as no court has interpreted the clause as preventing the states from exercising their police powers to ensure the health and safety of the people.⁵³ Instead, the Supreme Court has developed a balancing test to determine if a particular action impairs a contract.⁵⁴ A government act must be balanced against the impact such action has on a contract, and will be found constitutional "if it is reasonable and necessary to serve an important public purpose."⁵⁵

A threshold question that must be answered before completely investigating the impact of the Contract Clause is whether land use agreements between local governments and developers qualify as contracts subject to the Contract Clause.⁵⁶ The relationship between local government and developers is never strictly contract based, as the ever-increasing complexity of local, state and federal land use regulations define much of the relationship.⁵⁷ One of the earliest Contract Clause interpretations determined that a true contract is not needed for a contractual relationship with the government to be formed.⁵⁸ Yet not all relationships between government and private parties will rise to the level of a contractual obligation.⁵⁹ Subtle factors such as legislative language and the context of the government's actions are involved in determining whether the relationship is contractual.⁶⁰ Deals that involve the government as a party also have an additional layer of complexity under the Contract Clause; accordingly, they must be examined to determine if they have an impermissible blend of contract and police powers under the reserved powers doctrine.⁶¹

52. See Callies & Sonoda, *supra* note 5, at 386.

53. See *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 21 (1977); see also Callies & Sonoda, *supra* note 5, at 386-87.

54. *U.S. Trust Co.*, 431 U.S. at 21 ("We must attempt to reconcile the strictures of the Contract Clause with the 'essential attributes of sovereign power,' necessarily reserved by the States to safeguard the welfare of their citizens.").

55. *Id.* at 25. The police powers and Contract Clause concerns are typically dismissed by courts so long as the contracts are just, fair, reasonable and serve a legitimate public purpose. See, e.g., *Pima County v. Grossetta*, 97 P.2d 538, 541 (Ariz. 1939); *Carruth v. City of Madera*, 43 Cal. Rptr. 855, 860 (Ct. App. 1965); *Douglas v. City of Dunedin*, 202 So. 2d 787, 789 (Fla. App. 1967); *Pitzer v. City of Abilene*, 323 S.W.2d 623, 626 (Tex. App. 1959).

56. See Wegner, *supra* note 47, at 963.

57. See Green, *supra* note 9, at 448-54.

58. *Fletcher v. Peck*, 10 U.S. 87, 137 (1810) ("[The words of the Contracts Clause] are general, and are applicable to contracts of every description.").

59. Compare *Fisk v. Jefferson Police Jury*, 116 U.S. 131 (1885) (law which fixed pay rate for an attorney was an implied contract; therefore, state could not reduce pay after the services had been rendered), with *Douglas v. Kentucky*, 168 U.S. 488 (1897) (statute granting operation of lottery to private party was not a contract subject to Contract Clause). See also Wegner, *supra* note 47, at 963-64.

60. See Wegner, *supra* note 47, at 963-64.

61. See *id.* at 967.

B. Reserved Powers Doctrine

The reserved powers doctrine is a special limitation on the scope of the Contract Clause.⁶² An agreement that bargains away the state's police powers is void ab initio and not subject to the protections of the Contract Clause.⁶³ This rule, known as the reserved powers doctrine, has been black letter law since first defined by the Supreme Court in the 1879 case of *Stone v. Mississippi*.⁶⁴ The rule also prevents state legislatures from bargaining away their future right to use police powers.⁶⁵ The Court in *Stone* found that contracting away police power exceeds the authority given to the state by the people.⁶⁶ Zoning regulation is a delegation of the state's police power; therefore, local governments are similarly bound by such regulation.⁶⁷ Thus, local governments cannot give up their right to actions which promote the public health, safety, and welfare, such as the right to improve streets and other public infrastructure.⁶⁸

The Court in *Stone* did not establish a specific test for when the reserved powers doctrine is violated. In fact, the court recognized that police powers are difficult to define and "vary with varying circumstances."⁶⁹ Generally courts look for factors which indicate an impermissible blend of police powers and contract, such as a lack of government authority, a granting of unwarranted private rights, and an immediate public interest that is adversely impacted.⁷⁰ Additionally, some attention should be paid to the duration of the agreement, as the majority of cases invalidating an agreement have done so on the grounds that long-term or

62. *U.S. Trust Co.*, 431 U.S. at 21.

63. *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877).

64. 101 U.S. 814 (1879); *see also* *Dairyland Greyhound Park, Inc. v. Doyle*, 719 N.W.2d 408, 484-85 (Wis. 2006) ("The principles of *Stone* remain good law.).

65. *Stone*, 101 U.S. at 817-18. The court stated,

"Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police."

Id. (quoting *Metro. Bd. of Excise v. Barrie*, 34 N.Y. 657, 668 (N.Y. 1866)).

66. *Id.* at 820 ("[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away.").

67. 6 Zoning and Land Use Controls, *supra* note 17, § 35.03[2][a]-[b].

68. *Wabash Ry. Co. v. Defiance*, 167 U.S. 88, 97-98 (1897). The court held,

[T]he right of a city to improve its streets by regrading or otherwise is something so essential to its growth and prosperity that the common council can no more denude itself of that right than it can of its power to legislate for the health, safety, and morals of its inhabitants.

Id.

69. *Stone*, 101 U.S. at 820.

70. *See* *Wegner*, *supra* note 47, at 967.

permanent agreements not to exercise police power are per se invalid.⁷¹

C. Contract Zoning

As previously mentioned, developers and local government each have something the other desires with regard to a land use project—regulatory freezes or rezoning for the developer and funding of public infrastructure or other exactions for the government. Contract zoning occurs when this promise or performance from the developer is directly exchanged for an agreement to either rezone a property or freeze zoning regulations in their current form.⁷² Specifically, courts look to whether the government “‘enters into an agreement with a developer whereby the government extracts a performance or promise from the developer in exchange for its agreement to rezone the property.’”⁷³ This contracting away of the state’s police power violates the reserved powers doctrine.⁷⁴ Additionally, contract zoning requires local government to bind itself to a particular course of action, something which may violate the public duties that the local government must observe in granting zoning applications.⁷⁵ Thus, in order to avoid reserved powers and statutory roadblocks, developers and local governments must frame their agreements in such a manner as to avoid truly contracting away their police powers while still observing the requirements of the formal zoning approval process.

D. Exactions and the Nollan/Dolan Test

A final hurdle to negotiated land use agreements is a limitation on the scope and nature of exactions requested by the government. Exactions in the form of fees and dedications have long been a tool for controlling growth and offset the impact a development has on their community’s public infrastructure.⁷⁶ These fees, while arguably justified as an exercise of the government’s police power to promote public welfare, often go beyond the scope of an individual development.

71. See Callies & Sonoda, *supra* note 5, at 382-83.

72. McLean Hosp. Corp. v. Town of Belmont, 778 N.E.2d 1016, 1020 (Mass. App. Ct. 2002).

73. *Id.* (quoting 3 RATHKOPF ET AL., *supra* note 1, § 44:11).

74. *Id.* However, agreements involving zoning are not per se illegal as contract zoning; it is the nature of the agreement and the zoning action that determine the illegality. *Id.*

75. For example, public accountability laws, commonly referred to as “Sunshine Laws,” often require local legislative actions such as zoning to be held open to public comment prior to their approval. See, e.g., CAL. GOV’T CODE § 54953 (West 1997); FLA. STAT. ANN. § 286.011 (West 2003); OHIO REV. CODE ANN. § 121.22 (West 2007). An agreement between developers and local government prior to such a hearing may be viewed as rendering the public accountability illusory and thus in violation of the state’s Sunshine Law. See, e.g., Trancas Prop. Owners Ass’n v. City of Malibu, 41 Cal. Rptr. 3d 200, 206-07 (Ct. App. 2006); Chung v. Sarasota County, 686 So. 2d 1358, 1360 (Fla. Dist. Ct. App. 1996).

76. The use of such fees can be traced back to the invention of the subdivision, when local governments began charging a premium for subdivision platting as a simpler alternative to describing land by metes and bounds. See Callies & Sonoda, *supra* note 5, at 354.

The assessment of fees for the impact the development will have on large, shared public facilities invites scrutiny by the courts under the U.S. Constitution's Fifth Amendment Takings Clause to determine if a taking of private property for public use without just compensation has occurred.⁷⁷

Determining whether an exaction rises to the level of a taking is done under the test developed by the U.S. Supreme Court in *Nollan v. California Coastal Commission*⁷⁸ and *Dolan v. City of Tigard*.⁷⁹ In *Nollan*, homeowners questioned public beach access requirements placed upon a landowner as a condition for a building permit.⁸⁰ The Court, in holding that an unconstitutional taking had occurred, said there must be an "essential nexus" between the condition or exaction placed upon the owner, and the owner's purpose for the land, even when the condition imposed serves a valid government purpose.⁸¹

The *Nollan* court did not address what degree of relationship between the condition and the land's use constituted a nexus. This issue was subsequently addressed in *Dolan*, where the Court's majority held that local governments must demonstrate a relationship between the conditions imposed on a development and the development's impact on the community.⁸² In *Dolan*, a business owner applied for permission to expand the size of her store's parking lot. In return, the City required the business owner to donate a portion of her land as a public greenway and bicycle path. The City attempted to justify these requirements as necessary to offset the increased water runoff and vehicle traffic her larger parking lot would cause.⁸³ The Court, in finding that the City's requirements were an unconstitutional taking, required the condition to be in "rough proportionality" to the impact of the development.⁸⁴

The combined *Nollan/Dolan* test sets three standards that conditions imposed by local government must meet in order to pass the takings test. The condition must: 1) promote a legitimate government interest; 2) share an essential nexus with the development; and 3) be proportional to the need created by the development.⁸⁵ The test's limits on the scope of exactions are beneficial to developers, but also have unintended drawbacks.

First, the *Nollan/Dolan* test is more likely to be applied to exactions made on an ad hoc basis.⁸⁶ General legislation that applies to all developments in a community is usually not subject to the *Nollan/Dolan* test.⁸⁷ These general laws

77. See U.S. CONST. amend. V, cl. 3; Callies & Sonoda, *supra* note 5, at 355.

78. 483 U.S. 825 (1987).

79. 512 U.S. 374 (1994). For further commentary on the application of the *Nollan/Dolan* test to common exactions found in land use agreements, see Callies & Sonoda, *supra* note 5, at 354-80.

80. *Nollan*, 483 U.S. at 827-29.

81. *Id.* at 837.

82. *Dolan*, 512 U.S. at 390-91.

83. *Id.* at 379-80.

84. *Id.* at 390-91.

85. See Callies & Sonoda, *supra* note 5, at 360.

86. *Id.* at 369.

87. *Id.* at 367-69.

often assess impact fees according to fixed schedules in an attempt to meet the proportionality requirements of *Nollan* and *Dolan*.⁸⁸

Second, this trend toward uniformity, which *Nollan* and *Dolan* encourage, comes at the expense of market competition. "In fact, taken together, the nexus and proportionality doctrines stand for the proposition that most potential bargains are bad. Nexus and proportionality erect a jurisprudential barrier to value-creating exchange that would lie at the heart [sic] of successful negotiated resolutions to land use conflicts."⁸⁹ In many cases, the benefits of nonuniform exactions may outweigh the fairness concerns behind the *Nollan/Dolan* test: "Nonuniform property protection could provide a previously unidentified source of interlocal competition, allowing different communities to satisfy different demands by offering competing packages of property rights."⁹⁰

Third, under the *Nollan/Dolan* test, local governments lost the benefits that would occur under a market-oriented approach, where local governments are allowed to set varying levels of conditions on development.⁹¹ According to Professor Charles Tiebout's famous theory on local government competition, a balance of taxes versus services drives where residents choose to live, which in turn drives where a developer chooses to place his project.⁹² Conditions that support beneficial services greater than the specific impact of the development may be desirable to some developers, and if not, the developer can inform the local government that the conditions imposed are too high by simply taking his investment to another, more favorable municipality.⁹³

III. THE SOLUTIONS THUS FAR: CONDITIONAL ZONING AND DEVELOPMENT AGREEMENTS

One possible method of avoiding the constitutional concerns facing these public-private agreements is for developers to *voluntarily* impose conditions upon themselves, in the hope of a favorable regulatory decision by the local government.⁹⁴ This is the idea behind conditional zoning, a variation on contract

88. *Id.* at 371-74.

89. Erin Ryan, Student Article, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Conflicts*, 7 HARV. NEGOT. L. REV. 337, 376 (2002).

90. Christopher Serkin, *Local Property Law: Adjusting the Scale of Property Protection*, 107 COLUM. L. REV. 883, 884-85 (2007).

91. *Id.* at 887-88 (applying Professor Vicki Been's theory that exactions are constrained by market competition between local governments). For more on Professor Been's market-oriented theory of exactions, see Vicki Been, "Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 521 (1991).

92. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 417-20 (1956). For a modern approach to Tiebout's theory and its impact on land development, see Serkin, *supra* note 90, at 886.

93. See Serkin, *supra* note 90, at 887-89.

94. See Callies & Sonoda, *supra* note 5, at 403-04.

zoning which has largely been accepted as constitutional.⁹⁵ However, conditional zoning is limited in the scope of problems that it is capable of addressing. Conditional zoning agreements are also often unenforceable against the local government, who offers little recourse to the developer if local governments decide to back out of a proposed agreement.⁹⁶ An alternative to conditional zoning is statute-based development agreements. Such agreements avoid many of the scope and enforcement concerns of conditional zoning through clearly defined enabling statutes.⁹⁷

A. Conditional Zoning

1. *Advantages of Conditional Zoning and Differences from Contract Zoning.*—Conditional zoning is essentially a specialized form of contract zoning which purports to avoid the illegality of standard contract zoning.⁹⁸ The problem with contract zoning is the bilateral exchange of promises between the developer and local government requires the government to contract away powers it has no right to alienate. Conditional zoning attempts to solve this problem by framing this agreement as a *unilateral* promise by the developer, conditioned on the local government's future approval of a zoning application.⁹⁹ Typically this promise is made either through a zoning ordinance, or in the form of a binding covenant upon the developer's land which sets forth certain actions the developer will take if the desired regulations are passed.¹⁰⁰ Local government is thus not obligated by contract to pass certain legislation, removing concerns of violating the reserved powers doctrine. Additionally, because developers voluntarily promise to abide by certain conditions under conditional zoning, the *Nollan/Dolan* test regarding the nexus and proportionality of conditions may not apply.¹⁰¹

2. *Initial Problems with Conditional Zoning and the Modern Approach.*—Multiple concerns over the legality of conditional zoning have been raised over the years. First and foremost is the question of whether conditional zoning is, just like contract zoning, per se illegal. One of the earliest examinations of conditional zoning found that it exceeds the scope of power provided in zoning

95. 3 RATHKOPF ET AL., *supra* note 1, § 44:12.

96. *See, e.g.,* Morgran Co. v. Orange County, 818 So. 2d 640 (Fla. Dist. Ct. App. 2002). This case is discussed *infra* text accompanying notes 134-38.

97. *See infra* Part III.B.3.

98. Some commentators have viewed contract zoning and conditional zoning as merely two ends of the same spectrum of "contingent zoning" actions. The term "contract zoning" is simply applied to those with an illegal outcome, while "conditional zoning" applies to those which courts view more favorably. *See* Wegner, *supra* note 47, at 978-82.

99. 1 Zoning and Land Use Controls, *supra* note 17, § 5.01[2]-[4].

100. *Id.* § 5.01[2].

101. *See, e.g.,* City of Annapolis v. Waterman, 745 A.2d 1000, 1017-18 (Md. 2000). *But cf.* T-Mac, LLC v. Mayor & Common Council of Westminster, 2007 U.S. Dist. Lexis 61478, *2 n.1 (D. Md. 2007).

legislation.¹⁰² If the zoning is truly a unilateral action, then there may be no justification for why a particular parcel has received special exemptions from the comprehensive plan, leading to charges of “spot zoning.”¹⁰³ Concerns have also been raised over the possibility of private abuses of the police power. Developers and local politicians can enter politically beneficial deals without any direct evidence of a deal existing, thus creating a convenient method of distributing political kickbacks.¹⁰⁴

Furthermore, the supposed unilateral nature of conditional zoning covenants does not wholly remove the implication that a contract has been formed. Thus, even if the local government takes regulatory action without a binding contract directing such action, a regulatory decision in the developer’s favor could be seen as the result of an implied contract for spot zoning between the developer and local government.¹⁰⁵ If such an implied contract exists and the government’s decision prior to zoning hearings, then the government also violates procedural requirements of the zoning process, such as public notice prior to a final decision.¹⁰⁶

The majority of modern courts have moved beyond these concerns and approve the use of conditional zoning as a valid land use regulatory tool.¹⁰⁷ For example, Indiana has passed a statutory provision enabling developers to submit commitment proposals to be considered as part of a zoning hearing.¹⁰⁸ Under the modern perspective, conditional zoning is distinguished from contract zoning, and generally will be upheld if: 1) the regulatory action promotes public welfare and not merely a private interest; 2) the regulatory action does not constitute spot zoning; 3) the conditions are reasonable and legal; and 4) the government has not expressly contracted away their police powers.¹⁰⁹

102. See, e.g., *V. F. Zahodiakin Eng’g Corp. v. Zoning Bd. of Adjustment*, 86 A.2d 127, 131-32 (N.J. 1952).

103. *State ex rel. Zupancic v. Schimenz*, 174 N.W.2d 533, 539 (Wis. 1970). Spot zoning is “an arbitrary zoning or rezoning of a small tract of land that is not consistent with the comprehensive land use plan and primarily promotes the private interest of the owner rather than the general welfare.” 1 RATHKOPF ET AL., *supra* note 1, § 1:39.

104. See, e.g., *Goffinet v. County of Christian*, 333 N.E.2d 731, 736 (Ill. App. Ct. 1975) (describing conditional zoning as “neither all bad, nor all good” and finding the legality of a conditional zoning agreement dependant on the intentions of the zoning board); *V. F. Zahodiakin Eng’g Corp.*, 86 A.2d at 131 (finding that “undue hardship” is a valid reason for a zoning board placing special conditions on a zoning permit).

105. See *Knight v. Lynn Twp. Zoning Hearing Bd.*, 568 A.2d 1372, 1375-76 (Pa. Commw. Ct. 1990). But see *Zupancic*, 174 N.W.2d at 538-39 (holding that municipalities and landowners may contract as a motivation for rezoning so long as the rezoning is not spot zoning intended entirely for the benefit of the developers).

106. See *infra* note 166.

107. 3 RATHKOPF ET AL., *supra* note 1, § 44:12.

108. See, e.g., IND. CODE § 36-7-4-613 (2007) (written proposals submitted by developer become a binding part of the zoning ordinance if approved).

109. 3 RATHKOPF ET AL., *supra* note 1, § 44:12.

3. *Remaining Problems with Conditional Zoning.*—Although the majority of jurisdictions now favor conditional zoning,¹¹⁰ limitations still exist. Many courts still object to certain uses of conditional zoning on the basis that such uses destroy the uniformity of Euclidean zoning districts.¹¹¹ Other problems with conditional zoning are more fundamental. Conditional zoning is likely to violate the reserved powers doctrine if local government expressly agrees to limit its future regulatory powers toward the subject land.¹¹² Thus, developers cannot seek express regulatory freezes, but must instead rely on a local government's assurance to rezone and permit the development.¹¹³ The framing of conditional zoning agreements as a unilateral promise makes enforcement of such an agreement difficult, leaving a developer with little recourse should a local government entity change its mind and abandon the proposed zoning action.¹¹⁴ While a properly worded promise will not bind the developer further once the desired zoning has been revoked, the developer will still be out significant amounts of money if politics no longer support his proposal.¹¹⁵

B. Development Agreements

1. *Advantages of Development Agreements.*—Development agreements first came into prominence after the 1979 passage of a statute in California allowing local governments to enter into specific bilateral contracts with private developers.¹¹⁶ Development agreements are primarily statute based, which allows local governments to avoid the reserved powers and Contract Clause issues that arise when governments attempt to freeze regulations.¹¹⁷

Development agreement statutes offer a number of advantages over conditional zoning.¹¹⁸ One of the major problems with conditional zoning

110. See *id.* (noting that “many courts evidencing a modern trend, have expressly upheld or strongly indicated support for conditional rezoning,” and listing the states and decisions in footnote 1).

111. See, e.g., *Bartsch v. Planning & Zoning Comm’n*, 506 A.2d 1093 (Conn. App. Ct. 1986); *Mayor of Rockville v. Rylyns Enters.*, 814 A.2d 469, 501 (Md. 2002). For detailed analyses of these cases and their arguments regarding conditional zoning and uniformity, see Green, *supra* note 9, at 448-54.

112. See Green, *supra* note 9, at 458.

113. See, 3 RATHKOPF ET AL., *supra* note 1, § 44:12.

114. See *Morgran Co. v. Orange County*, 818 So. 2d 640 (Fla Dist. Ct. App. 2002). This case is discussed further *infra* text accompanying notes 134-38.

115. See Kent, *supra* note 22, at 5-6.

116. See CAL. GOV’T CODE §§ 65864-69 (West 1997); 1 Zoning & Land Use Controls, *supra* note 17, § 5.06.

117. 2 Zoning and Land Use Controls, *supra* note 17, § 9A.02.

118. In addition to avoiding constitutional problems found under contract zoning and conditional zoning, development agreements offer a number of advantages both to developers and to local governments:

Under the development agreement model of land use controls, the developer gains

agreements is that no matter how separate a developer's covenants appear from the local government's legislative decisions, the air of implied contract still permeates the arrangement.¹¹⁹ Development agreement statutes respond to this problem by incorporating conditions as part of the approval process and providing for public oversight in the form of hearings prior to approval of the agreement.¹²⁰ Development agreement statutes also require agreements to limit the time over which a regulatory freeze may operate.¹²¹ Moreover, the statutes often require that the development agreement conform to a comprehensive plan, eliminating concerns over spot zoning.¹²² The statutes also provide for regular compliance reviews over the course of the agreement to ensure a developer is complying with the requirements of the agreement.¹²³

2. *Reserved Powers and Development Agreements.*—Theoretically, the statutory basis of development agreements provides some protection against the constitutional problems associated with contract and conditional zoning. Thus far, however, only a California appellate court has ruled on the validity of regulatory freezes under development agreements, in the case of *Santa Margarita Area Residents Together v. San Luis Obispo County (SMART)*.¹²⁴ In *SMART*, a coalition of neighborhood associations challenged the development agreement created for the redevelopment of a 13,800 acre ranch.¹²⁵ The agreement called for a five-year regulatory freeze so as to allow the developer to conduct both

the following: (1) certainty as to the governing regulations for the development project; (2) the ability to bargain for support and the coordination of approvals; (3) easier and less-costly financing because of the reduction of the risk of non-approval; (4) the ability to negotiate the right to freeze regulations as to changes in the project; (5) predictability in scheduling the phases of the development; and (6) a change in the dynamics of the development process from confrontation to cooperation.

The municipality gains the following: (1) the facilitation of comprehensive planning and long-range planning goals; (2) commitments for public facilities and off-site infrastructure; (3) public benefits otherwise not obtainable under regulatory takings doctrine; and (4) the avoidance of administrative and litigation costs and expenditures.

Green, *supra* note 9, at 394.

119. State *ex rel.* Zupancic v. Schimenz, 174 N.W.2d 533, 539 (noting that landowners may make contracts that are used by zoning boards as motivation for zoning approval, but cautioning that a fine line exists between using a contract as motivation and entering into a bargain: "In recognizing the legality of what was done here, we caution that the procedure might well lead to an agreement with the zoning authority which might be fatal.").

120. See, e.g., CAL. GOV'T CODE § 65867 (West 1997); HAW. REV. STAT. ANN. § 46-128 (LexisNexis 2007).

121. See, e.g., CAL. GOV'T CODE § 65865.2 (West 1997); HAW. REV. STAT. ANN. § 46-126(a)(4) (LexisNexis 2007).

122. See, e.g., CAL. GOV'T CODE § 65867.5(b) (West 1997 & Supp. 2008); HAW. REV. STAT. ANN. § 46-129 (LexisNexis 2007).

123. See, e.g., CAL. GOV'T CODE § 65865.1 (West 1997).

124. 100 Cal. Rptr. 2d 740 (Ct. App. 2000).

125. *Id.* at 742.

planning and building under the freeze.¹²⁶ The court declined to find an unconstitutional surrender of police powers, “unless the contract amounts to the ‘surrender’ or ‘abnegation’ of a proper governmental function.”¹²⁷ Instead, the development agreement “is more accurately described as a legitimate exercise of governmental police power in the public interest than as a surrender of police power to a special interest.”¹²⁸ In other words, rather than being a limitation on future police powers, the regulatory freeze itself is a valid exercise of current police powers. This view of a development contract completely reverses the view of similar agreements under contract zoning principles and emphasizes the importance of enabling legislation.¹²⁹ Without an enabling statute, development agreements offering regulatory freezes are likely per se invalid instances of contract zoning.

3. Shortcomings and Remaining Problems.—Despite the obvious advantages of development agreements over conditional zoning, a few remaining concerns limit their effectiveness. The main limit on the effectiveness of development agreements is the significance of enabling legislation to ensure true enforceability.¹³⁰ As of 2005, only fifteen states had passed development agreement statutes.¹³¹ The bilateral nature of a development agreement makes their enforcement in states which object to contract zoning highly unlikely. In fact, only two states without development agreement statutes have upheld the use of development agreements.¹³² As demonstrated by the *SMART* court, enabling statutes drastically change the court’s perspective on the validity of contractual

126. *Id.* at 743.

127. *Id.* at 748 (quoting *Morrison Homes Corp. v. City of Pleasanton*, 103 Cal. Rptr. 196, 202 (Ct. App. 1976)).

128. *Id.* (citing *Morrison Homes Corp.*, 103 Cal. Rptr. at 202).

129. *See Callies & Sonoda, supra* note 5, at 381-86.

130. DAVID L. CALLIES ET AL., *BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES* 97 (2003).

131. Thirteen states have passed comprehensive development agreement enabling statutes allowing bilateral negotiations between local governments and private developers. *See, e.g.*, ARIZ. REV. STAT. ANN. § 24-68-102 (2008); FLA. STAT. ANN. § 163.3220 (West 2006); HAW. REV. STAT. ANN. § 46-121 (Lexis Nexis 2007); IDAHO CODE ANN. § 67-6511A (West 2006); LA. REV. STAT. ANN. § 33:4780.21 (2002); MD. ANN. CODE art. 66B, § 13.01 (2002); NEV. REV. STAT. ANN. § 278.0201 (West 2000); N.J. STAT. ANN. § 40:55D-45.2 (West 2008); OR. REV. STAT. ANN. §§ 94.504-94.528 (West 2003 & Supp. 2008); S.C. CODE ANN. § 6-31-10 (2004); WASH. REV. CODE ANN. §§ 36.70B.170-36.70B.190 (West 2003). A number of other states allow development agreements in limited circumstances, such as municipal annexations. *See, e.g.*, 65 ILL. COMP. STAT. ANN. 5/11-15.1-1 (West 2005).

132. *See Giger v. City of Omaha*, 442 N.W.2d 182, 190 (Neb. 1989) (finding development agreements to be a form of conditional zoning); *Save Elkhart Lake, Inc. v. Village of Elkhart Lake*, 512 N.W.2d 202, 205 (Wis. Ct. App. 1993) (finding that the city’s promise to cooperate toward making the project successful did not circumvent the normal approval process, and thus did not contract away the state’s police power).

zoning arrangements.¹³³ In order to ensure the constitutionality of development agreements, an enabling statute appears necessary.

While development agreements make it possible for local governments to offer highly desirable regulatory freezes to developers, not everything a developer might require is guaranteed through a development agreement. For example, in the Florida appellate case of *Morgran Co. v. Orange County*,¹³⁴ a developer entered into a development agreement calling for the immediate rezoning of a property.¹³⁵ However, the developer, perhaps wary from prior experience under conditional zoning agreements, did not request a binding commitment to rezone, but rather merely required the city to "support and expeditiously process" the rezoning request.¹³⁶ Under mounting political pressure, the zoning commission then changed its mind on the proposed rezoning and sought to disavow the development agreement.¹³⁷ The court held that a commitment to "support" rezoning amounted to a contracting away of the commission's final authority on rezoning.¹³⁸ The developer in *Morgran* was essentially in an impossible position. Attempting to bind the county to a particular rezoning decision would likely have resulted in a violation of the reserved powers doctrine. Yet any language less binding would have left the county with no obligations under the development agreement. Ultimately, development agreements will not be able to fully protect against shifting political attitudes to a project unless a concerted effort is made to involve the community.¹³⁹

One final unresolved issue with development agreements is the applicability of the *Nollan/Dolan* takings test. No court has directly addressed the applicability of this test to statutory development agreements.¹⁴⁰ Case law regarding conditional zoning agreements indicates that if the conditions are truly

133. *SMART*, 100 Cal. Rptr. 2d at 748-49 (noting the California development agreement statute expanded police power to allow contemporary approaches to development that might otherwise have been deemed a surrender of the state's police power).

134. 818 So. 2d 640 (Fla. Dist. Ct. App. 2002).

135. *Id.* at 641.

136. *Id.*

137. *Id.* at 642.

138. *Id.*

139. *See infra* Part IV.

140. *See* Michael H. Crew, *Development Agreements After Nollan v. California Coastal Commission* 483 U.S. 825 (1987), 22 URB. LAW. 23, 28 (1990). Perhaps the closest a court has come to ruling on the applicability of the *Nollan/Dolan* test to development agreements was *Toll Brothers v. Board of Chosen Freeholders*, 944 A.2d 1 (N.J. 2008). In *Toll Bros.*, the New Jersey Supreme Court considered whether a development agreement could restrain a developer from applying for additional payments based on changed circumstances, as permitted by a separate New Jersey statute which codifies the *Nollan/Dolan* test. The court found such a limitation unfairly restrictive, and in violation of the nexus and proportionality requirements of the statutory *Nollan/Dolan* test. *Id.* at 16-18. The court discussed the nature and benefits of development agreements at length, but did not directly subject this one to the *Nollan/Dolan* test. *Id.*

voluntary submissions by the developer, then *Nollan/Dolan* does not apply.¹⁴¹ However, a court's view of what is truly voluntary may be entirely persuaded by the statutory nature of development agreements. Courts and commentators have noted that it is often "very difficult to tell whether a landowner's acceptance of a condition is truly voluntary or is instead a submission to government coercion."¹⁴² In *Rocky Mountain Christian Church v. Board of County Commissioners*,¹⁴³ the Federal District Court for Colorado characterized a development agreement between the county and a church as "required" by the county as a condition for rezoning.¹⁴⁴ The court dismissed the church's claims on statute of limitations grounds,¹⁴⁵ but the implication is clear that a requirement to enter into a development agreement may well place its conditions within the realm of *Nollan/Dolan* requirements.¹⁴⁶

The *Nollan/Dolan* test also fails to apply to development agreements because, in most cases, development agreements are promises of forbearance from action, rather than promises of action on the part of the local government.¹⁴⁷ Specifically, the authors note, "In the case of a development agreement, the municipality is not granting the landowner the right to develop nor imposing conditions on such development, but instead promising to protect the developer's investment by not enforcing any subsequent land-use regulation that may burden the project."¹⁴⁸ The development going forward is not strictly contingent on the board's action, making existence of a nexus to the development irrelevant.¹⁴⁹ Viewed in this light, the only test from *Nollan/Dolan* which still applies would be a requirement that the exaction be reasonable.¹⁵⁰ This requirement serves as an important guard against public abuse of development agreements.¹⁵¹ However, because development agreement enabling statutes broadly define what is an appropriate exaction, it is likely that only the most egregious abuses would be deemed unreasonable.¹⁵²

141. See, e.g., *City of Annapolis v. Waterman*, 745 A.2d 1000, 1017-18 (Md. 2000) (subdivision agreement between city and developer was not an unconstitutional taking of developer's property).

142. Crew, *supra* note 140, at 46.

143. 481 F. Supp. 2d 1213 (D. Colo. 2007).

144. *Id.* at 1225.

145. *Id.* at 1226.

146. *Id.* at 1225-26.

147. See Callies & Sonoda, *supra* note 5, at 405-06.

148. *Id.*

149. *Id.*

150. See Crew, *supra* note 140, at 53 ("The test for reasonableness of exactions does not vary according to whether they are 'voluntary' or not, *Nollan* applies even where the developer has agreed to the condition.").

151. *Id.* at 50-55.

152. For example, Hawaii's development agreement statute states, "Public benefits derived from development agreements may include, but are not limited to, affordable housing, design standards, and on-and off-site infrastructure and other improvements. Such benefits may be

IV. COMMUNITY BENEFIT AGREEMENTS

A. *What Are Community Benefit Agreements?*

A community benefit agreement (CBA) is an agreement made between developers and representatives of a broad sampling of the communities most likely to be affected by the proposed development.¹⁵³ CBAs provide benefits to both the developer and the community organizations, while providing a means for both groups to enforce the other's promises.¹⁵⁴ In essence, CBAs allow the developer to preemptively address community concerns, avoiding much of the protracted negotiations associated with a court challenge to a large project after final approval.¹⁵⁵

The problems and concerns addressed in a CBA are dependent on the facts of a particular development, and, thus, no standard form exists for such an agreement.¹⁵⁶ Yet, all CBAs offer several established benefits to both the developer and the community. First, a CBA provides enforceability of promises.¹⁵⁷ Both the developer's promises to improve a community and the community coalition's support for the development are bound in a legally enforceable contract.¹⁵⁸ Second, a CBA provides clarity by requiring developers and community coalitions to specify their promises in writing.¹⁵⁹ Local governments gain a clear list of tangible benefits resulting from their approval of the development.¹⁶⁰ A CBA also provides accountability, not just to the community coalition and the developer, but to the public at large, as the numerous organizations within a coalition, local government, and the media will

negotiated for in return for the vesting of development rights for a specific period." HAW. REV. STAT. ANN. § 46-121 (LexisNexis 2007).

153. JULIAN GROSS ET AL., COMMUNITY BENEFIT AGREEMENTS: MAKING DEVELOPMENT PROJECTS ACCOUNTABLE 9 (2005), available at http://www.laane.org/docs/research/CBA_Handbook_2005.pdf. The first CBA was developed by the Los Angeles Alliance for a New Economy (LAANE), a community coalition that successfully used a CBA to influence development of the Hollywood and Highland entertainment complex (Kodak Theater) in the late 1990's. LAANE, *Community Benefit Agreements*, <http://www.laane.org/policy/cbas.html> (last visited Sept. 16, 2008).

154. See GROSS ET AL., *supra* note 153, at 9-10.

155. Michael A. Cardozo, *The Use of ADR Involving Local Governments: The Perspective of the New York City Corporation Counsel*, 34 FORDHAM URB. L.J. 797, 803 (2007) (noting that the CBA is, in effect, "a form of mediation before litigation even begins").

156. See GROSS ET AL., *supra* note 153, at 10-11. Common benefits bargained for in a CBA include fair housing subsidies, "first source" hiring policies, day care, living wage covenants enforceable against retail tenants, and environmental benefits. *Id.*

157. *Id.* at 21.

158. *Id.* at 11-14.

159. *Id.* at 21-22.

160. *Id.* at 22.

all have exposure to the development of the agreement and opportunities to monitor its implementation.¹⁶¹ Finally, by addressing a community's issues upfront, the developer avoids delays during the approval process which have the potential to inconvenience and frustrate the developer, local government, and the public at large to equal degree.¹⁶²

Because a CBA benefits more than just the parties signing the agreement, the best solution for securing the benefits of a CBA for all affected is to incorporate the CBA into a development agreement between the developer and local government.¹⁶³ This essentially makes the government a party to the CBA, allowing local government to enforce the CBA's provisions against the developer.¹⁶⁴ Incorporation of a CBA into a development agreement also presents an opportunity to incorporate meaningful public participation into the zoning approval process. Development agreements between local government and a developer have the potential to turn public zoning hearings into closed door negotiations,¹⁶⁵ violating public accountability requirements for such governmental actions.¹⁶⁶ Public input in the form of a CBA ensures that, along with the required public hearings,¹⁶⁷ the community's voice is heard at every step of the negotiation and approval process.

B. CBAs as Solution to Problems with Development Agreements

Because negotiations are conducted directly with the community, developers can avoid two major problems with standard land use agreements negotiated solely with local government. First, the community's bargaining chip in the negotiations is political pressure on behalf of the development.¹⁶⁸ The community coalition's ability to bring about a CBA depends directly on the developer's need

161. *Id.*

162. *Id.*

163. The Partnership for Working Families, *Legal Issue: CBAs and Development Agreements*, <http://www.communitybenefits.org/article.php?id=562> (last visited Sept. 16, 2008).

164. See GROSS ET AL., *supra* note 153, at 9-10.

165. See Barbara L. Bezdek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 59-61 (2006).

166. Settlement of a zoning dispute without public input may violate a state's "Sunshine Law," which ensures that certain legislative processes, such as zoning boards, are open and accessible by requiring public meetings for many local government functions. Two recent decisions invoked the Brown Act, California's Sunshine Law, in voiding zoning dispute settlements based upon a lack of a public hearing to discuss the settlements, which essentially granted a zoning permit in exchange for consideration from the developer. See *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1056-57 (9th Cir. 2007); *Trancas Prop. Owners Ass'n v. City of Malibu*, 41 Cal. Rptr. 3d 200, 206-07 (Ct. App. 2006). While neither case involved a development agreement under California's development statute, it is likely that the Sunshine Law's public scrutiny requirement would apply to the approval of development agreements as well.

167. See, e.g., CAL. GOV'T CODE §§ 54952.6, 54953(a) (West 1997).

168. See GROSS ET AL., *supra* note 153, at 9; Marcello, *supra* note 10, at 659-60.

for zoning approval, public subsidies, and other benefits approved by local government.¹⁶⁹ If the developer already has sufficient financial and political backing, community coalitions lack the leverage with which to negotiate a CBA.¹⁷⁰ Whether the developer seeks public subsidies, a zoning variance, or both, the approval comes from publicly accountable bodies, thus making community support a valuable bargaining chip for the developer.¹⁷¹ Perhaps the most important benefit developers receive is support for public subsidies, a crucial part of any large development.¹⁷² When a complex urban project with mixed political support is involved, an agreement ensuring the backing of major community groups can be invaluable as it protects against last minute political shifts that might deny a crucial rezoning approval.¹⁷³ In addition, the considerations are made by the developer to community groups instead of the local government and thus not subject to the *Nollan/Dolan* test for the relationship of the condition to the project.¹⁷⁴ CBAs may then be incorporated into a development agreement, allowing the local government to enforce the provisions of the agreement without the possibility of the conditions violating the *Nollan/Dolan* test.¹⁷⁵

C. CBAs and NIMBY Syndrome

One of the main benefits a developer receives from a CBA is a minimization of the NIMBY effect of their development, a problem largely arising from a lack of community involvement in important development decisions.¹⁷⁶ Large-scale developments which produce benefits to the broader community but disproportionately affect the residents near the development's location (such as an airport) are often the focus of heated protests by local residents.¹⁷⁷ CBAs can bring attention to many issues which might otherwise be overlooked by the

169. See Marcello, *supra* note 10, at 660.

170. *Id.*

171. See GROSS ET AL., *supra* note 153, at 10.

172. See Marcello, *supra* note 10, at 659.

173. See *Morgran Co. v. Orange County*, 818 So. 2d 640 (Fla. Dist. Ct. App. 2002), discussed *supra* text accompanying notes 134-38.

174. See Salkin, *supra* note 13, at 1425 n.114 ("Whether CBA provisions constitute exactions, however, is dependent on the local government being significantly involved in developing the CBA . . .").

175. However, two situations could arise in which the *Nollan/Dolan* test might apply. First is when the government is significantly involved in the CBA negotiation process. See Salkin, *supra* note 13, at 1425. Second, if a state has not enacted a development agreement statute, a CBA which is incorporated into a development agreement with local government may be viewed as an exaction, or worse yet, extortion. *Id.*

176. See Charles G. Field, *Building Consensus for Affordable Housing*, 8 HOUSING POL'Y DEBATE 801 (1997), available at [http://www.mi.vt.edu/data/files/hpd%208\(4\)/hpd%208\(4\)_field.pdf](http://www.mi.vt.edu/data/files/hpd%208(4)/hpd%208(4)_field.pdf); Richman, *supra* note 6, at 225-28.

177. See Richman, *supra* note 6, at 223.

developer and local government, including whether the development is appropriate in scale to the neighborhood and whether the proposal sufficiently cushions the impact it has on local residents.¹⁷⁸

Others have argued that CBAs “have little or nothing to do with the NIMBY . . . problem.”¹⁷⁹ “Area residents who are unalterably opposed to a proposed development simply will not enter into CBA negotiations because that would commit them to support the development. CBAs are not an ‘antidote’ to NIMBY concerns; they essentially inhabit two different worlds.”¹⁸⁰ However, unanimous support is not needed to combat the effects of NIMBY syndrome.¹⁸¹ A CBA addresses the underlying problems of NIMBY disputes—problems such as a lack of communication between developers and the community, a lack of a clear and organized community coalition, and a lack of trust that the developer will follow through on promises.¹⁸² Though CBAs may not have been designed with NIMBY syndrome in mind, the underlying problems addressed by CBAs are effective at minimizing NIMBY development opposition.

One notable example of dealing with NIMBY syndrome through a CBA is the 2004 LAX Airport Expansion.¹⁸³ A community coalition bargained for local benefits for those most affected by the expansion.¹⁸⁴ Benefits were specifically designed to minimize the impact on the neighborhood, including soundproofing of local churches, schools, and residences along flight paths, nighttime flight restrictions, pollution controls, and a local first source hiring policy.¹⁸⁵ By negotiating a CBA with a broad coalition, the city was able to resolve a number of disparate concerns, including environmental, labor, minority and local resident interests.¹⁸⁶

The LAX CBA, like most CBAs, was initiated by a grassroots community movement in response to the development announcement.¹⁸⁷ However, it could be argued the agreement benefited the city as much as it did the community. By obtaining the support of a wide range of interests in advance, the City effectively prevented a number of legal battles which could have delayed or further limited the scope of the airport expansion.¹⁸⁸ Thus, CBAs offer an effective means to

178. See GROSS ET AL., *supra* note 153, at 15.

179. See Marcello, *supra* note 10, at 668.

180. *Id.*

181. Some groups have demands that are simply incompatible with the goals of a CBA. For example, when a development is contingent on the use of eminent domain, property owners unwilling to sell and opposed to eminent domain of their lands will not be a party capable of making any meaningful contributions to a CBA. See *infra* Part IV.D.2.

182. See Richman, *supra* note 6, at 225-28; see also Field, *supra* note 176, at 811-15.

183. *Community Benefits Agreement: LAX Master Plan Program*, available at http://www.laane.org/docs/policy/cbas/LAX_CBA.pdf [hereinafter *LAX Master Plan Program*].

184. See GROSS ET AL., *supra* note 153, at 15-19.

185. *LAX Master Plan Program*, *supra* note 183, at pts. III, V, X.

186. See GROSS ET AL., *supra* note 153, at 15-16.

187. *Id.* at 15-17.

188. See *id.* at 18. Technically, the LAX CBA did not require the community groups to

limit delays caused by NIMBY opposition to highly polarizing development projects.

D. Remaining Issues with CBAs

CBAs are relatively new and untested methods of negotiating land use deals. Most court decisions involving CBAs have only indirectly referenced the CBA, and have provided no analysis of the CBA's legality.¹⁸⁹ Without guidance from the courts, several potential problems will need to be addressed. Although one of the main benefits touted by supporters of CBAs is the enforceability by community organizations, this enforceability has not been tested in court,¹⁹⁰ and questions have been raised about the logistics of enforcing an agreement made with numerous community organizations.¹⁹¹

1. *Enforcement of CBAs.*—Until the enforceability of a CBA is tested in court, the exact scope of a CBA's binding power is unknown.¹⁹² Critics have questioned the enforceability of CBAs due to the lack of any express benefits offered as consideration to the developer within the CBA.¹⁹³ However, this is unlikely to prevent a court's enforcement, as the support offered by community groups is a valid, if intangible, benefit. Specifically, such support is often crucial

promise to support the airport expansion project. This was because the "developer" with whom the agreement was made was a governmental entity. Instead of the usual promises to support zoning approval or public funding requests, the community organizations promised not to file lawsuits to challenge the project. Under either approach, the opposition of a broad range of community interests is resolved prior to development, thus reducing the chances of legal battles that would otherwise delay the project. *Id.*

189. Most opinions thus far have only tangentially dealt with CBAs, often attacking the underlying project on eminent domain grounds, but not addressing the CBA. *See infra* notes 216-17. Perhaps the closest a court has come to addressing the legality of CBAs was the case of *Merced County Farm Bureau v. County of Merced*, No. 150013, (Cal. Sup. Ct. Merced. Co. May 16, 2008). This case addressed the applicability of the California Environmental Quality Act (CEQA) to a CBA's provisions. The court determined that the environmental impact report required by the CEQA prior to approval of a project must include some mention of the impact caused by the CBA's proposed benefits, effectively treating the CBA as a portion of the development itself. *Id.* at *12. Although not directly addressing the legality of the CBA, the court's treatment of the CBA as an integral part of the development bodes well for future attempts to bind developers to a CBA's provisions. For more on the *Merced County* decision, see Amy Lavine, *CBAs Go to Court (for the First Time?)*, <http://communitybenefits.blogspot.com/2008/02/cbas-go-to-court-for-first-time.html> (last visited Sept. 17, 2008); Corinne Reilly, *Judge's Ruling Sends Riverside Motorsports Park Back to Starting Line*, *MERCED SUN-STAR*, Feb. 27, 2008, at A1.

190. *See* Salkin, *supra* note 13, at 1424.

191. *See* GROSS ET AL., *supra* note 153, at 23-24.

192. *See supra* notes 190-91 and accompanying text.

193. *See* Erik Engquist, *Developers' Deal-Making Escalates: Community Benefit Agreements Become Costly As Bloomberg Endorses Concept*, *CRAIN'S NEW YORK BUSINESS*, Mar. 27, 2006, available at 2006 WLNR 5423866.

for developers seeking to gain public funding and zoning regulation amendments.¹⁹⁴ What is still unclear is how enforceable some of the broader provisions common in CBAs will be, such as requiring all businesses within a development to employ workers at a living wage. Many CBAs attempt to bind these future business tenants of a development through restrictive covenant, but this too is untested.¹⁹⁵ Furthermore, it is not clear who within the community coalition has standing to enforce the agreement, or how developers can enforce an agreement against coalition members.¹⁹⁶ Often a loose coalition of community organizations and individuals, usually with the status of an unincorporated association, negotiate the CBA.¹⁹⁷ The enforcement of the agreement by the developer may be problematic if the CBA was signed solely by the coalition. For example, if the developer seeks enforcement against a member of the coalition who is in violation of the agreement, the coalition may respond that the individual is not acting in an official capacity on behalf of the coalition. If the agreement is only enforceable against members of the coalition when acting as a coalition, it is effectively meaningless.¹⁹⁸ If each organization signs individually, then the duties of each organization under the agreement and its right to uphold the agreement may be preserved past the dissolution of the coalition group.¹⁹⁹ If not, then the best solution for enforcement is to couple CBAs with a development agreement so as to allow local government to enforce the provisions on behalf of the community.²⁰⁰

However, adding local governments as an enforceable party to the agreement may lead to several further complications for both developers and community groups. Local governments may want a hand in the creation of the CBA. After all, the local government is tasked with enforcing, often pushing positions at odds with the community coalition.²⁰¹ Local governments should be careful not to become too involved in CBA negotiations. Direct government involvement may lead to the agreement's concessions being viewed as exactions subject to the *Nollan/Dolan* test and thus defeat one of the major benefits CBAs offer to local

194. See *supra* Part IV.B.

195. Salkin, *supra* note 13, at 1425.

196. See GROSS ET AL., *supra* note 153, at 23-24.

197. *Id.*

198. *Id.*

199. *Id.* at 24.

200. See Salkin, *supra* note 13, at 1409-10.

201. One notable example of problems created by government involvement in CBA negotiation occurred with the negotiation of a CBA for the Pittsburgh Penguins Arena development in the Hill district of Pittsburgh. When city and county leaders presented a rather perfunctory proposed CBA to the media, community coalition members, angered at not having been included in the negotiations, set a copy of the agreement on fire. Wade Malcolm, *Agreement on Arena Benefits Goes Up in Flames: Hill District Group Rejects City-County Development Pact, Then Lights It on Fire*, PITTSBURGH POST-GAZETTE, Jan. 8, 2008, at B1, available at 2008 WLNR 394033.

governments.²⁰²

Government enforcement of these privately bargained for agreements may only be possible in states with a development agreement statute.²⁰³ California, which pioneered the CBA, has had repeated success by incorporating CBAs into development agreements.²⁰⁴ States without development agreement statutes have had mixed success in implementing CBAs.²⁰⁵ For example, New York has no development agreement enabling statute, and has seen a disproportionate number of CBAs fail.²⁰⁶ Much of this failure is due to the fact that “local officials in New York City have, until recently, been discouraged from allowing community benefits to influence land use decisions for fear of distorting the planning and review process.”²⁰⁷ The lack of support from city officials has led to many developers rushing inexperienced community groups through the negotiation process, thereby causing the community groups to fail in obtaining any meaningful benefits.²⁰⁸ For example, the Bronx Terminal Market CBA was negotiated by eighteen community groups selected by the borough president, but without any guidance, the groups were rushed to complete a proposal in a month.²⁰⁹ Only three of the groups then signed the resulting CBA.²¹⁰

Without the threat of enforcement by the City, New York developers have had little reason to take community negotiations seriously.²¹¹ The Bronx Terminal Market CBA has also been widely criticized for promising relatively few benefits and containing little to keep a developer from reneging on its promises.²¹² The fine for a violation was only \$60,000, far below the value of benefits promised, including \$3 million for community job training.²¹³

2. *Negotiation of CBAs.*—CBAs also face practical problems due to the scope of the projects involved and the need for broad community coalition involvement in order to make any settlement meaningful.²¹⁴ Bringing together a sufficiently broad coalition may be an impossible task due to the differing perspectives of each group.²¹⁵ Public support is a crucial bargaining chip in CBA

202. See *supra* text accompanying note 174.

203. See Salkin, *supra* note 13, at 1410.

204. See *id.* at 1411-15.

205. *Id.* at 1415.

206. See *id.* at 1418-20.

207. *Id.* at 1418.

208. See *id.* at 1417.

209. *Id.*

210. *Id.*

211. See *id.* at 1418-19.

212. Heather Haddon, *Terminal Market Deal Criticized*, NORWOOD NEWS, Feb. 23, 2006, available at <http://www.bronxmall.com/norwoodnews/past/022306/news/N60223page1.html> (last visited Sept. 16, 2008).

213. *Id.*

214. See Salkin, *supra* note 13, at 1423.

215. *Id.* at 1424.

negotiations,²¹⁶ and so it can be assumed that the parties involved are willing to support a development proposal, provided that the benefits are satisfactory. However, some groups will inevitably oppose developments. Such is the case when eminent domain is employed in the acquisition of land for a development. Residents facing eminent domain may have no motivation to negotiate with the developer seeking to acquire their property.²¹⁷ At least two developments utilizing CBAs have seen local residents facing eminent domain opt out of the agreement and file takings actions instead.²¹⁸ A third case sought to challenge the civil rights implications of a development agreement which incorporated a CBA, but was dismissed for lack of standing.²¹⁹

Some have criticized the CBA negotiation process for being overreaching and encouraging “extractions” from developers for any significant project.²²⁰ As Julia Vitullo-Martin, a fellow at the conservative think tank, The Manhattan Institute, put it, “It’s just the Wild West, . . . [a]nybody who wants something comes forward and demands it from the developer.”²²¹ This sentiment may in part be due to the escalating nature of CBA benefits. Community leaders looking to negotiate a CBA will use prior CBAs as the “floor” for negotiations and seek richer package benefits for their community.²²² Yet this escalation of community benefits cannot continue indefinitely. For the moment, CBAs are still entirely optional,²²³ and developers who find the price of community involvement too high may simply seek their public funding and zoning approval through more conventional lobbying efforts, or may be deterred from developing in a community at all.²²⁴

What a CBA does require to be successful is the mobilization of a broad base of community support.²²⁵ CBAs with limited participation have met with equally limited success. For example, the Atlantic Yards project in Brooklyn—New

216. See Marcello, *supra* note 10, at 659-60.

217. CBAs address *community* issues. A homeowner facing condemnation and an eminent domain taking will naturally be more interested in preventing the loss of their own home than in benefiting the community at large.

218. See *Goldstein v. Pataki*, 516 F.3d 50 (2d Cir. 2008); *Cramer Hill Residents Ass’n, Inc. v. Primas*, 928 A.2d 61 (N.J. Super. Ct. App. Div. 2007).

219. *Huertas v. City of Camden*, 245 F. App’x 168, 172 (3d Cir. 2007). The CBA involved in each development was not directly at issue in *Goldstein*, *Cramer Hill*, or *Huertas*.

220. Two vocal proponents of this view were former New York Mayors Rudolph Giuliani and Ed Koch. Current Mayor Michael Bloomberg is supportive of many of the City’s CBA agreements. See Engquist, *supra* note 193.

221. *Id.*

222. See GROSS ET AL., *supra* note 153, at 23.

223. However, some groups have called for mandatory CBAs for all projects seeking public funding or zoning approval. See Engquist, *supra* note 193.

224. See Marcello, *supra* note 10, at 668-69 (“If ‘economic development’ is narrowly defined to mean attracting new business into the local economy, CBAs may be viewed unfavorably as mere ‘speed bumps’ that increase costs and deter developers from investing in a community.”).

225. See GROSS ET AL., *supra* note 153, at 23-24.

York's first CBA—has received a negative reaction in Brooklyn and has been criticized for its lack of true community involvement.²²⁶ Established community groups did not participate, instead negotiations were held with organizations that were largely organized for the purpose of participation in the CBA.²²⁷ These groups then received specific contributions from the developer, appearing to some to be largely interested in their own financial gain rather than benefits for the community at large.²²⁸ This pattern of limited community involvement was once again seen in the Yankee Stadium CBA, an agreement to which no community organizations were parties.²²⁹ Instead, four elected officials signed the agreement on the community's behalf.²³⁰ Similar to the Atlantic Yards CBA, the Yankee CBA has been criticized as a “slush fund” with community investment funds distributed according to political favor rather than community need.²³¹ The chairperson of the distribution committee had political ties to several of the signatories, and the identities of the rest of the distribution committee have not been publicly disclosed.²³² In fact, although money was set aside for community development on the first day of construction, after seventeen months, no funds had been disbursed to community organizations.²³³ Paradoxically, although government officials negotiated the agreement on the community's behalf, the City was unable to enforce the agreement because there were no municipal funds involved.²³⁴

If negotiations fail with part of the coalition, developers may lose their incentive to negotiate with the rest of the coalition.²³⁵ Faced with less than total support, the developer may switch to a “divide and conquer” strategy and attempt to pare down the number of community groups involved in the coalition in order to preserve the appearance of community involvement while excluding many key groups and issues from negotiations.²³⁶ Even if the coalition can stay unified throughout the CBA negotiation, the developer may still have an incentive to withhold some concessions if it anticipates litigation after approval of the project.²³⁷ Because courts increasingly compel the use of mediation and other alternative dispute resolution tools in land use disputes, community coalitions

226. See Salkin, *supra* note 13, at 1416.

227. Of the eight organizations participating, only two existed prior to the negotiations. Matthew Schuerman, *Ratner Sends Gehry to Drawing Board*, N.Y. OBSERVER, Dec. 4, 2005, available at <http://www.observer.com/node/38021>.

228. *Id.*

229. See Timothy Williams, *Yankee Stadium is Going up, but Bronx Still Seeks Benefits*, NEW YORK TIMES, Jan. 7, 2008, at B1.

230. *Id.*

231. See Salkin, *supra* note 13, at 1417-18.

232. Williams, *supra* note 229.

233. *Id.*

234. *Id.*

235. See Salkin, *supra* note 13, at 1417-18.

236. See GROSS ET AL., *supra* note 153, at 22.

237. See Cardozo, *supra* note 155, at 803-04.

may actually be encouraged to find a reason to litigate after approval of the development so as to gain a second set of benefits out of mediation.²³⁸ This in turn could cause developers to withhold concessions during CBA negotiations, or if litigation appears to be inevitable, to avoid such agreements altogether.²³⁹

CONCLUSION

Dealing with complex land use development proposals requires more than standard Euclidean zoning has to offer. Negotiation is fast becoming the dominant tool for land use decisions,²⁴⁰ and such negotiations require tools that address constitutional and public accountability concerns.²⁴¹ Development agreements are an ideal framework for such negotiations, and a wider adoption of development agreement enabling statutes is necessary to affect the principles of smart growth throughout the nation.²⁴² The major remaining question regarding development agreements is whether their consensual nature avoids the application of the *Nollan/Dolan* takings test to their bargains.²⁴³ By incorporating most concessions into a community benefits agreement, the parties avoid constitutional takings issues and allow for broader, more flexible solutions to deal with the impact of large urban developments.²⁴⁴ CBAs also ensure public involvement in the development process that is more than illusory;²⁴⁵ this represents a clear improvement over the air of closed-door bargaining that often accompanies public-private land use negotiations.²⁴⁶ The recent rise in negative sentiment toward public-private developments has illustrated the need for greater public involvement in the development approval process.²⁴⁷ Community benefit agreements are an ideal tool for gaining greater public support for large-scale development projects.

238. *Id.* at 803.

239. *Id.*

240. *See Green, supra* note 9, at 392 n.46 and accompanying text.

241. *See supra* Part II.

242. *See Callies & Sonoda, supra* note 5, at 408.

243. *Id.*

244. *See supra* Part IV.B.

245. *See Salkin, supra* note 13, at 1409-10.

246. *See Marcello, supra* note 10, at 661-62.

247. *See supra* note 13 and accompanying text.

DRAWING A LINE ON THE BLACKBOARD: WHY HIGH SCHOOL STUDENTS CANNOT WELCOME SEXUAL RELATIONSHIPS WITH THEIR TEACHERS

ROZLYN FULGONI-BRITTON*

INTRODUCTION

Jeanette Chancellor and Christian Oakes began a sexual relationship at the end of Jeanette's junior year of high school.¹ Jeanette was seventeen years old and had recently earned the position of drum major in the school band.² Mr. Oakes was twenty-nine years old and was Jeanette's band teacher.³ Jeanette and Mr. Oakes had sex approximately forty-six times during Jeanette's senior year of high school.⁴ They had sex during band camp, in a closet in the school's band room, in Mr. Oakes's car, and at a hotel during a band trip.⁵

During the spring of Jeanette's senior year, Mr. Oakes also engaged in a sexual relationship with another student.⁶ That student's mother reported the relationship to a local police department.⁷ The police ultimately arrested Mr. Oakes and he pled guilty to two counts of corruption of a minor: one count for the other student and one for Jeanette.⁸ After Mr. Oakes's arrest, Jeanette, who from an early age struggled with depression, anorexia, and bulimia, attempted suicide and was repeatedly hospitalized for psychiatric reasons.⁹

Jeanette sued her school for sexual harassment under Title IX of the Education Amendments of 1972.¹⁰ On a motion for summary judgment, the school argued that Jeanette "was not 'harassed' because she 'consented' to sex with Oakes."¹¹ The U.S. District Court for the Eastern District of Pennsylvania held, unequivocally, that "a high school student who is assigned to a teacher's class does not have the capacity to welcome that teacher's physical sexual

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1. Chancellor v. Pottsgrove Sch. Dist., 501 F. Supp. 2d 695, 698-99 (E.D. Pa. 2007).

2. *Id.* at 699.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 704; see 20 U.S.C. § 1681(a) (2006).

11. Chancellor, 501 F. Supp. 2d at 705.

conduct.”¹² After stating that sexual conduct qualifies as sexual harassment, and sexual harassment is sex discrimination, the court concluded that “a teacher who has sex with a high school student who is assigned to his class discriminates against the student on the basis of sex in violation of Title IX.”¹³

This holding was one of the factors that allowed Jeanette’s suit to survive summary judgment.¹⁴ Judge Robreno understood the harm that can result from treating a high school student, in this case a minor, as having the legal capacity to consent to sex with her teacher.¹⁵

While *Chancellor v. Pottsgrove School District* is a significant step in the right direction, the United States Department of Education has ignored the persuasive evidence that demonstrates that high school students lack the capacity to consent to sex with their teachers.¹⁶ The Department of Education has not taken the necessary steps to protect public school students. Currently, there is only a rebuttable presumption that the “sexual conduct between an adult school employee and a student is not consensual.”¹⁷ The Department of Education should advocate that high school students do not have the capacity to consent to sex with their teachers.

In Part I, this Note briefly reviews and explains the history of sexual harassment in public schools, discusses how these claims are grounded in Title IX, and notes the laws currently in place to criminally prosecute teacher-abusers. Part II explores how courts and the Department of Education view the issue of welcomeness as applied to secondary students. Part III identifies the problems with the current approaches taken by courts and the Department of Education. Part IV offers two proposals to resolve these problems. First, age of consent laws should control in inquiries into welcomeness when a teacher sexually harasses a secondary student. Second, courts and the Department of Education should protect all secondary students by finding the unwelcome element of sexual harassment automatically met when a teacher and secondary student are involved in a sexual relationship.

I. BACKGROUND OF SEXUAL HARASSMENT IN SCHOOLS

The U.S. Supreme Court defined students’ rights under Title IX in several

12. *Id.* at 708.

13. *Id.*

14. *Id.*

15. *See id.* at 704-08. For ease of reference and to mirror the example of sexual harassment in *Chancellor*, the Author will use feminine pronouns for students and masculine pronouns for teachers. The Author acknowledges that many male students are also sexually harassed in secondary schools.

16. *See id.* at 707.

17. OFFICE OF CIVIL RIGHTS, DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 8 (2001), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter DEP’T OF EDUC., SEXUAL HARASSMENT GUIDANCE].

pivotal cases: *Cannon v. University of Chicago*,¹⁸ *Franklin v. Gwinnett County Public Schools*,¹⁹ and *Gebser v. Lago Vista Independent School District*.²⁰ In addition to recovery under Title IX, laws exist to criminally prosecute students' sexual harassers. Many of these laws do not allow consent as a defense to the crime.

The issue of the capacity to consent is pivotal in sexual harassment suits under Title IX because it goes directly to the issue of unwelcomeness, which is an element of a *prima facie* case of sexual harassment.²¹ To establish a *prima facie* case of sexual harassment, the plaintiff must allege that she was subjected to *quid pro quo* sexual harassment or to a sexually hostile environment; that she alerted an official at the school receiving Title IX funds who had adequate authority to correct the harassment; and that the school's response to the reported harassment amounted to deliberate indifference.²² To successfully allege hostile environment under Title IX, a plaintiff must show that: (1) she is part of a class protected by Title IX; (2) she was subjected to *unwelcome* sexual harassment; (3) the harassment was based on sex; (4) the harassment was severe enough to "alter the conditions of her education and create an abusive educational environment;" and (5) she has established a basis for institutional liability.²³ The capacity to "welcome" conduct is directly analogous to the capacity to "consent" to conduct.

A. Title IX and Sexual Harassment in Schools

Title IX of the Education Amendments of 1972 states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."²⁴ Congress intended to accomplish two objectives with Title IX: "First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices."²⁵ Title IX "applies to virtually every school district and college in the United States because of the pervasiveness of federal support."²⁶

The Supreme Court in *Cannon* found that there is a judicially-implied private

18. 441 U.S. 677 (1979).

19. 503 U.S. 60 (1992).

20. 524 U.S. 274 (1998).

21. *Chancellor*, 501 F. Supp. 2d at 707; *accord* *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467-68 (8th Cir. 1996), *rev'd on other grounds*, 171 F.3d 607 (8th Cir. 1999).

22. *Morse v. Regents of Univ. of Colorado*, 154 F.3d 1124, 1127-28 (10th Cir. 1998) (citing *Gebser*, 524 U.S. at 290).

23. *Kinman*, 94 F.3d at 467-68 (citing *Seamons v. Snow*, 84 F.3d 1226, 1232 (10th Cir. 1996)).

24. 20 U.S.C. § 1681(a) (2006).

25. *Cannon*, 441 U.S. at 704.

26. Todd A. DeMitchell, *The Inadequacy of Legal Protections for the Sexual Abuse of Students: A Two-Track System*, 215 W. EDUC. L. REP. 505, 515 (2007).

right of action present in the text of Title IX.²⁷ The Court held that "Title IX presents the atypical situation in which *all* of the circumstances that the Court has previously identified as supportive of an implied remedy are present. [The Court] therefore conclude[d] that petitioner may maintain her lawsuit, despite the absence of any express authorization for it in the statute."²⁸ However, because the protections of Title IX hinge on the receipt of federal funds, lawsuits alleging a violation of Title IX may be successfully brought only against the public entity that receives the funds.²⁹ In 1992, the Supreme Court expanded the judicially implied right of action under Title IX in *Franklin v. Gwinnett County Public Schools* by holding that Title IX supported a claim for monetary damages.³⁰ The Court did not determine when a school district is liable for monetary damages when a teacher sexually harasses a student.³¹

However, in *Gebser*, the Supreme Court addressed when a student can seek monetary damages under Title IX.³² A student exercised the implied private right of action by suing her school district and seeking monetary damages under Title IX for alleged sexual harassment by a teacher.³³ The teacher and student had engaged in a sexual relationship for over a year.³⁴ The Court considered and rejected two possible standards for liability: respondeat superior and constructive notice.³⁵ The Court explained that if either of these standards were used to evaluate liability, "it [would] likewise be the case that the recipient of [federal] funds [would be] unaware of the discrimination."³⁶ Rather, "Title IX's express means of enforcement—by administrative agencies—operates on an assumption of actual notice to officials of the funding recipient."³⁷

The *Gebser* Court adopted a standard requiring actual knowledge.³⁸ The Court held that "a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond."³⁹ The Court, seemingly aware of the way in which its holding would make damage

27. *Cannon*, 441 U.S. at 703.

28. *Id.* at 717.

29. *See* *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1019 (7th Cir. 1997) ("Because Title IX only protects against discrimination under any education program or activity receiving federal financial assistance . . . a Title IX claim can only be brought against a grant recipient and not an individual.").

30. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992).

31. *See id.*

32. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286-90 (1998).

33. *Id.* at 278-79.

34. *Id.* at 278.

35. *See id.* at 282-83.

36. *Id.* at 287.

37. *Id.* at 288.

38. *Id.* at 290-91.

39. *Id.* at 290.

claims difficult, attempted to soften its holding by expressing great concern over the number of cases of sexual harassment in schools.⁴⁰ The Court explained that the harm a student suffers as a result of sexual harassment is undeniable and such conduct by a teacher is reprehensible.⁴¹ The Court identified other rights of recovery available to students under state law and 42 U.S.C. § 1983.⁴² While *Gebser* is laudable because it provided a right of action for victims of sexual harassment in schools, the Court should have emphatically held that the sexual abuse of students will not be endured.⁴³ As the dissent stated, “the Court ranks protection of the school district’s purse above the protection of immature high school students.”⁴⁴ The actual knowledge standard set by the *Gebser* Court is extremely high because the non-response by a school district must amount to deliberate indifference before the standard is met, making a student’s burden to successfully claim sexual harassment nearly impossible.⁴⁵

*B. Laws Currently in Place to Protect Students and to Prosecute
Their Abusers Criminally*

Although a sexual harassment claim is the primary way for student-plaintiffs to demand monetary compensation for the extreme misconduct of a teacher, there are also laws in place to punish the teacher-defendant. The most obvious criminal charge is one of statutory rape. While these laws supplement and reinforce Title IX, they do not eliminate the need for recovery under Title IX.

1. *Statutory Rape Laws*.—There is no federal statutory rape law, and consequently these laws vary state-to-state. Still, the basic premise behind each law remains the same—criminalize sexual conduct with minors under a stated age.⁴⁶ “[F]our states set the legal age of consent to sexual activity, absent special circumstances, at age fourteen. Almost half of the states set the age of consent at below the age of majority and only seven set it at eighteen, absent special circumstances.”⁴⁷ All of these ages fall among the ages of students at various stages of their high school education.

A subset of statutory rape laws exist in at least one state.⁴⁸ Georgia has

40. *Id.* at 292.

41. *Id.*

42. *Id.*

43. Todd A. DeMitchell, *The Duty to Protect: Blackstone’s Doctrine of In Loco Parentis: A Lens for Viewing the Sexual Abuse of Students*, 2002 BYU EDUC. & L.J. 17, 50.

44. *Gebser*, 524 U.S. at 306.

45. DeMitchell, *supra* note 43, at 51.

46. Kay L. Levine, *The Intimacy Discount: Prosecutorial Discretion, Privacy, and Equality in the Statutory Rape Caseload*, 55 EMORY L.J. 691, 708 (2006).

47. Jennifer Ann Drobac, “Developing Capacity”: Adolescent “Consent” at Work, at Law, and in the Sciences of the Mind, 10 U.C. DAVIS J. JUV. L. & POL’Y 1, 7 (2006) [hereinafter Drobac, *Developing Capacity*].

48. See *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 705 (E.D. Pa. 2007) (“Some states have taken . . . [the] next logical step, explicitly providing that a student cannot consent to

“impose[d] criminal penalties on a person who has sexual contact with a student enrolled in a school when that person has supervisory or disciplinary authority over the student.”⁴⁹ The statute that criminalizes such conduct addresses this conduct in the same paragraph as it criminalizes sexual contact between a probation or parole officer and a probationer or parolee.⁵⁰ This grouping of relationships hints at how the Georgia legislature views the relationship of school employees and students.⁵¹ The Georgia legislature appears to view the student-teacher relationship as a custodial relationship with the same potential for abuse as in other custodial relationships.

2. *Corruption of Minors Laws.*—In addition to the more serious charge of statutory rape, in some states a teacher can be convicted of corruption of a minor.⁵² For example, Pennsylvania has a law that states that anyone over the age of eighteen who “corrupts or tends to corrupt the morals” of anyone younger than eighteen years of age, or “who aids, abets, entices or encourages any such minor in the commission of any crime, or who knowingly assists or encourages such minor in violating his or her parole or any order of court, commits a misdemeanor of the first degree.”⁵³ Consent is not a defense to a corruption of minors charge.⁵⁴ The teacher in *Chancellor* (the case described in the introduction) pled guilty to this crime.⁵⁵

Although there are many laws to criminally punish teachers who engage in sexual relationships with their students, criminal prosecution is not enough. Interaction between teachers and students is an everyday reality for school-aged children, and the relationship between teachers and students must never include

sex with her teacher.”).

49. *State v. Eastwood*, 535 S.E.2d 246, 248 (Ga. Ct. App. 2000).

50. GA. CODE ANN. § 16-6-5.1(b) (West 2003 & Supp. 2007):

A probation or parole officer or other custodian or supervisor of another person referred to in this Code section commits sexual assault when he or she engages in sexual contact with another person who is a probationer or parolee under the supervision of said probation or parole officer or who is in the custody of law or who is enrolled in a school or who is detained in or is a patient in a hospital or other institution and such actor has supervisory or disciplinary authority over such other person. A person convicted of sexual assault shall be punished by imprisonment for not less than ten nor more than 30 years; provided, however, that any person convicted of the offense of sexual assault under this subsection of a child under the age of 14 years shall be punished by imprisonment for not less than 25 nor more than 50 years. Any person convicted under this subsection of the offense of sexual assault shall, in addition, be subject to the sentencing and punishment provisions of Code Section 17-10-6.2.

51. See *infra* Part IV.C for a detailed discussion of the similarities between a teacher’s custodial role and a prisoner employee’s custodial role.

52. See, e.g., *Chancellor*, 501 F. Supp. 2d at 699. A teacher who engaged in sexual relationships with two students pled guilty to two counts of corruption of a minor. *Id.*

53. See *Corruption of Minors*, 18 PA. CONS. STAT. § 6301(a)(1) (2000).

54. *Commonwealth v. Decker*, 698 A.2d 99, 100 (Pa. Super Ct. 1997).

55. *Chancellor*, 501 F. Supp. 2d at 699.

an inquiry into welcomeness, regardless of whether the inquiry happens in a civil or criminal context.

II. SEXUAL RELATIONSHIPS BETWEEN SECONDARY STUDENTS AND TEACHERS ARE DIFFERENT THAN SEXUAL RELATIONSHIPS IN OTHER CONTEXTS

Sexual relationships between secondary students and teachers differ from relationships between other parties such as college students and professors or employers and employees. There are many intuitive reasons to support such an assertion, most prominently an innate sense that sex between a teacher and a high school student is simply wrong. As true as this is, more concrete reasons do exist.

A. *Secondary Students and Teachers Versus College Students and Professors*

Relationships between secondary students and their teachers are significantly different from relationships between college students and their professors. The age difference and subsequent maturity of college students is the most identifiable and the most relevant difference between the two groups.⁵⁶ Secondary students range in age from twelve to nineteen—depending on whether junior high school students are considered elementary or secondary students.⁵⁷ The majority of college students are of the age of majority and have the legal capacity to consent to sex in every state.

When considering relationships between college students and professors, some of the same concerns present in relationships between secondary students and teachers exist. Most prominent is the presence of power disparity and the extent of trust between student and teacher.⁵⁸ Some authors have argued that any “consent” given in professor-student relationships should be legally ineffective because of the “power dependency relationship” present.⁵⁹ Under current law, however, having a sexual relationship with an adult, including an adult college student, is not criminal.

There is also a distinction between secondary and college students in claims

56. William A. Kaplin, *A Typology and Critique of Title IX Sexual Harassment Law After Gebser and Davis*, 26 J.C. & U.L. 615, 628 (2000) (“Elementary/secondary education and higher education differ substantially from one another in structure and mission. The ages and maturity levels of students can also vary dramatically from one level to the other, leading to differences in perspective on questions about when conduct is sexual and when sexual conduct is consensual.”).

57. See, e.g., IND. CODE § 20-33-2-6 (2007). Indiana law requires students to begin school during the year the student turns seven years old. *Id.* If a student turns seven while in first grade, the student would turn thirteen during seventh grade, consequently entering seventh grade at age twelve.

58. Margaret H. Mack, *Regulating Sexual Relationships Between Faculty and Students*, 6 MICH. J. GENDER & L. 79, 82-84 (1999).

59. Phyllis Coleman, *Sex in Power Dependency Relationships: Taking Unfair Advantage of the “Fair” Sex*, 53 ALBANY L. REV. 95, 95-96 (1988).

involving peer-on-peer sexual harassment.⁶⁰ In *Davis v. Monroe County Board of Education*,⁶¹ the Court held that a school may be liable under Title IX for peer-on-peer sexual harassment.⁶² The Court emphasized the differences in the amount of control a school can exert over an employee as compared to a student.⁶³ The student in *Davis* was a fifth-grade girl who was allegedly harassed by a classmate who attempted to touch her breasts and genitals.⁶⁴ Although this case was decided in the context of peer-on-peer sexual harassment in an elementary school, the Court explicitly noted the applicability of its holding to colleges, explaining that “[a] university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy. . . .”⁶⁵ In light of this standard and the differences between a college and secondary or elementary school, a college is less liable for peer-on-peer sexual harassment than elementary and secondary schools.⁶⁶

B. Secondary Students and Teachers Versus Employers and Employees

Just as there is a difference in sexual relationships between college professors and students and secondary teachers and students, there is also a difference in the relationship between secondary teachers and students and employers and employees. Title VII of the Civil Rights Acts of 1964⁶⁷ provides the employee’s primary protection from discrimination, including sexual harassment.⁶⁸ When deciding whether conduct constitutes sexual harassment, the Equal Employment Opportunity Commission looks at the whole record and at the totality of the circumstances, including “the nature of the sexual advances and the context in which the alleged incidents occurred.”⁶⁹

Relationships between students and teachers are different from the employment context involved in Title VII.⁷⁰ Children are not required to work,

60. See Kaplin, *supra* note 56, at 628-29.

61. 526 U.S. 629 (1999).

62. *Id.* at 643 (“We consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX . . . when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does.”).

63. *Id.* at 645 (“[A] recipient’s damages liability [is limited] to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.”); see Kaplin, *supra* note 56, at 628-29.

64. *Davis*, 526 U.S. at 633.

65. *Id.* at 649.

66. See Kaplin, *supra* note 56, at 629.

67. See 42 U.S.C. § 2000(e) (2006).

68. Brianne J. Gorod, *Rejecting “Reasonableness”: A New Look at Title VII’s Anti-Retaliation Provision*, 56 AM. U. L. REV. 1469, 1474 (2007).

69. 29 C.F.R. § 1604.11(b) (1999).

70. See Amy K. Graham, Note, *Gebser v. Lago Vista Independent School District: The Supreme Court’s Determination that Children Deserve Less Protection than Adults from Sexual*

but compulsory education laws exist in all fifty states.⁷¹ These laws range from

Harassment, 30 LOY. U. CHI. L.J. 551, 588-96 (1999).

71. ALA. CODE § 16-28-3 (2001) (compulsory between seven and sixteen); ALASKA STAT. § 14.30.010 (2006) (compulsory between seven and sixteen); ARIZ. REV. STAT. ANN. § 15-802 (2002 & Supp. 2007) (compulsory between six and sixteen); ARK. CODE ANN. § 6-18-201 (West 2004) (compulsory between five and seventeen); CAL. EDUC. CODE § 48200 (2006) (compulsory between six and eighteen); COLO. REV. STAT. ANN. § 22-33-104 (West 2005 & Supp. 2007) (compulsory between seven and seventeen); CONN. GEN. STAT. ANN. § 10-184 (West 2002) (compulsory between five and eighteen); DEL. CODE. ANN. tit. 14, § 2701 (2006) (compulsory between five and sixteen); FLA. STAT. ANN. § 1003.21 (West 2004 & Supp. 2008) (compulsory between six and sixteen); GA. CODE ANN. § 20-2-690.1 (West 2003 & Supp. 2007) (compulsory between six and sixteen); HAW. REV. STAT. ANN. § 302A-1132 (LexisNexis 2006) (compulsory between six and eighteen); IDAHO CODE ANN. § 33-202 (2006) (compulsory between seven and sixteen); 105 ILL. COMP. STAT. ANN. § 5/26-1 (West 2006) (compulsory between seven and seventeen); IND. CODE § 20-33-2-6 (2007) (compulsory between seven and eighteen); IOWA CODE ANN. § 299.1 (West 1988 & Supp. 2008) (compulsory between six and sixteen); KANSAS STAT. ANN. § 72-1111 (2002) (compulsory between seven and eighteen); KY. REV. STAT. ANN. § 159.010 (West 2006) (compulsory between six and sixteen); LA. REV. STAT. ANN. § 17:221 (2001) (compulsory between seven and eighteen); ME. REV. STAT. ANN. tit. 20-A § 5001-A (2008) (compulsory between seven and seventeen); MD. CODE ANN., EDUC. § 7-301 (West 2002 & Supp. 2007) (compulsory between five and sixteen); MASS. GEN. LAWS ANN. ch. 76, § 1 (West 1996) (ages set by board of education, compulsory to fourteen); MICH. COMP. LAWS ANN. § 380.1561 (West 2005) (compulsory between six and sixteen); MINN. STAT. ANN. § 120A.22 (West 2000 & Supp. 2008) (compulsory between seven and sixteen); MISS. CODE ANN. § 37-13-91 (West 2000 & Supp. 2007) (compulsory between six and seventeen); MO. ANN. STAT. § 167.031 (West 2000 & Supp. 2008) (compulsory between seven and a district-set compulsory attendance age); MONT. CODE ANN. § 20-5-102 (2007) (compulsory between seven and sixteen); NEB. REV. STAT. § 79-201 (2003 & Supp. 2006) (compulsory between seven and eighteen); NEV. REV. STAT. ANN. § 392.040 (West 2006 & Supp. 2008) (compulsory between seven and eighteen); N.H. REV. STAT. ANN. § 193:1 (1999 & Supp. 2007) (compulsory between six and eighteen); N.J. STAT. ANN. § 18A:38-25 (West 1999) (compulsory between six and sixteen); N.M. STAT. ANN. § 22-12-2 (West 2003 & Supp. 2007) (compulsory up to eighteen); N.Y. EDUC. LAW § 3205 (McKinney 2001 & Supp. 2008) (compulsory between six and sixteen); N.C. GEN. STAT. ANN. § 115C-378 (West 2000 & Supp. 2007) (compulsory between seven and sixteen); N.D. CENT. CODE § 15.1-20-01 (2003) (compulsory between seven and sixteen); OHIO REV. CODE ANN. § 3321.01 (West 2005 & Supp. 2008) (compulsory between six and eighteen); OKLA. STAT. ANN. tit. 70, § 10-105 (West 2005 & Supp. 2008) (compulsory between five and eighteen); OR. REV. STAT. ANN. § 339.010 (West 2003) (compulsory between seven and eighteen); 24 PA. STAT. ANN. § 13-1326 (West 1992) (compulsory between eight and seventeen); R.I. GEN. LAWS § 16-19-1 (2006 & Supp. 2008) (compulsory between six and sixteen); S.C. CODE ANN. § 59-65-10 (2004) (compulsory between five and seventeen); S.D. CODIFIED LAWS § 13-27-1 (2004 & Supp. 2008) (compulsory between six and sixteen); TENN. CODE ANN. § 49-6-3001 (West 2006) (compulsory between six and seventeen); TEX. EDUC. CODE ANN. § 25.085 (Vernon 2006 & Supp. 2008) (compulsory six and eighteen); UTAH CODE ANN. § 53A-11-101 (West 2004 & Supp. 2008) (compulsory between six and eighteen); VT. STAT. ANN. tit. 16, § 1121 (2007) (compulsory between six and sixteen); VA. CODE

requiring children ages five to eighteen to attend school, to requiring school attendance for children between the ages of seven and sixteen, and many other possible combinations.⁷² Although some of these laws do not require children to attend school past the age of sixteen, the importance of a high school degree is a strong incentive to complete school. This difference between the workplace and schools is important and sobering. An employee can arguably find another place to work to avoid sexual harassment. A student cannot leave his or her school and will often be in contact with the abuser over multiple years.⁷³

One author explained the difference between school and the workplace with an analysis of services provided in the respective environments.⁷⁴ Students, through their parents, pay for the services schools provide, while in the workplace employers pay for the services provided by employees.⁷⁵ These service-provided-relationships flow in different directions, which greatly influences each relationship.⁷⁶ A school's purpose is to educate its students and an employer's purpose is to run a successful business.⁷⁷ The author then claims that "[s]ex-based harassment in the educational context fundamentally frustrates and interferes with the purpose of the teacher-student relationship."⁷⁸ A school must create a supportive environment that helps facilitate its purpose of educating its students. Disrupting that environment results in "a reduction in the educational benefit that the student receives" and lowers the value of services provided.⁷⁹

Another approach that highlights the differences between a school and the

ANN. § 22.1-254 (2006) (compulsory between five and eighteen); WASH. REV. CODE ANN. § 28A.225.010 (West 2006) (compulsory between eight and eighteen); W. VA. CODE ANN. § 18-8-1a (West 2002) (compulsory between six and sixteen); WIS. STAT. ANN. § 118.15 (West 2004 & Supp. 2007) (compulsory between six and eighteen); WYO. STAT. ANN. § 21-4-102 (2007) (compulsory between seven and sixteen). All of the above ages are subject to several exceptions.

72. See statutes cited *supra* note 71.

73. See Angela Duffy, *Can a Child Say Yes? How the Unwelcomeness Requirement Has Thwarted the Purpose of Title IX*, 27 J.L. & EDUC. 505, 509 (1998) ("[C]hildren do not have a choice about whether to attend school, and most cannot choose which school they attend. . . . [I]n the Title VII context, although still not fair, it is conceivably far easier for an employee to change jobs than it is for a student to change schools."); Mary M. v. N. Lawrence Cmty. Sch. Corp., 131 F.3d 1220, 1226 (7th Cir. 1997) ("[A]s economically difficult as it may be for adults to leave a hostile workplace, it is virtually impossible for children to leave their assigned school."); see also Carrie N. Baker, Comment, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271, 292 (2004) ("[S]tudents . . . are required to attend school and may not have alternatives to the school where they are harassed.").

74. See Baker, *supra* note 73, at 290-91.

75. *Id.* at 290.

76. *Id.* at 290-91.

77. *Id.*

78. *Id.* at 291.

79. *Id.* (quoting Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 540 (1987)).

workplace compares the relationship between students and teachers to the relationship between children and parents.⁸⁰ Both relationships involve “custodial and supervisory control” over a child.⁸¹ It is universally acknowledged that the child-parent relationship does not include the sexual abuse of the child or negligently exposing the child to abuse.⁸² Clearly there is no question of welcomeness involved in parent-child sexual relationships. However, the question is raised in teacher-student relationships even though the relationship encompasses many of the same features of a parent-child relationship.⁸³

The similarities between teacher-student relationships and parent-child relationships emphasize how teacher-student relationships differ from employer-employee relationships. Employers do not have custodial duties over their employees, nor do they wield the extensive power over their employees that teachers possess. The power imbalance in teacher-student relationships is the reason that a student cannot consent to a sexual relationship. The power a teacher exercises over a student aids the teacher in taking advantage of the student.⁸⁴ The dissent in *Gebser* recognized this, insightfully observing that “[a]s a secondary school teacher, Waldrop exercised even greater authority and control over his students than employers and supervisors exercise over their employees. His gross misuse of that authority allowed him to abuse his young student’s trust.”⁸⁵ This same observation has been made by authors who advocate for stronger protection of students and is a primary reason why the teacher-student relationship must be protected in such a way that the welcomeness of student-teacher sexual relationships is never questioned.⁸⁶

III. THE COURTS’ AND THE DEPARTMENT OF EDUCATION’S CURRENT APPROACHES TO WELCOMENESS AND STUDENTS

A. *The Courts*

An excellent example of why the issue of a student’s welcomeness is important is *Mary M. v. North Lawrence Community School Corp.*⁸⁷ In this case, a thirteen-year-old eighth grade student and a cafeteria employee engaged in a flirtatious relationship that culminated in the student and employee leaving

80. DeMitchell, *supra* note 43, at 50.

81. *Id.* at 35.

82. *Id.*

83. *Id.* at 50.

84. *Id.* at 34 (“Sexually abusive teachers . . . misuse the authority of their positions when they sexually molest children under their control.”).

85. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 299 (1998) (Stevens, J., dissenting).

86. DeMitchell, *supra* note 43, at 33 (“[S]chool employees are aided in their misconduct by the power and authority they have over children given to them by virtue of their school employment and its attendant in loco parentis status.”).

87. 131 F.3d 1220 (7th Cir. 1997).

school to have sex.⁸⁸ The district court held that it was appropriate for a jury to consider whether the conduct was unwelcome when reaching its verdict.⁸⁹ The student appealed the case to the Seventh Circuit,⁹⁰ which specifically addressed the issue of welcomeness.⁹¹ After finding that an eighth grade student was an elementary student in the particular school district, the court held that “[w]elcomeness is an improper inquiry to be made in Title IX cases involving sexual discrimination of elementary school children.”⁹²

The Seventh Circuit engaged in a lengthy discussion of welcomeness and elementary school students, citing several reasons why welcomeness should not be a question of fact in Title IX cases.⁹³ These reasons include concerns over subjecting a young student to intense scrutiny and the differences between Title VII and Title IX cases.⁹⁴ The court supported its holding by listing several differences that exist between the classroom and the workplace, including the greater control and influence teachers have over students.⁹⁵ The court also emphasized the greater harm that results from sexual harassment in the classroom when compared to sexual harassment in the workplace. “[T]he harassment has a greater and longer lasting impact on its younger victims, and institutionalizes sexual harassment as accepted behavior.”⁹⁶ The court also noted the affect sexual harassment has on the development of students’ intellectual potential, the fact that schools act in loco parentis while employers do not, and that employees are “older and (presumably) know how to say no to unwelcome advances, while children may not even understand that they are being harassed.”⁹⁷ While all of these reasons seem to apply to secondary students with equal force, the Seventh Circuit explicitly declined to address “whether secondary school students can welcome sexual advances in harassment claims arising under Title IX.”⁹⁸

Disagreement exists among courts as to whether age of consent laws make it a legal impossibility for a student under the age of consent to welcome the harassing conduct. The Seventh Circuit in *Mary M.* acknowledged that there was no case on point as to the capacity of an elementary student to welcome sexual conduct and consequently looked to criminal law.⁹⁹ Indiana, the state in which the sexual relationship between the student and teacher occurred, set the age of

88. *Id.* at 1221-23.

89. *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 951 F. Supp. 820, 826-27 (S.D. Ind.), *rev'd*, 131 F.3d 1220 (7th Cir. 1997).

90. *Mary M.*, 131 F.3d at 1221.

91. *See id.*

92. *Id.* at 1225.

93. *Id.* at 1226-27.

94. *Id.*

95. *Id.* at 1226 (citing *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186, 1193 (11th Cir. 1996), *rev'd*, 120 F.3d 1390 (11th Cir. 1997) (en banc)).

96. *Id.*

97. *Id.* at 1226-27.

98. *Id.* at 1225 n.6.

99. *Id.* at 1227.

consent at sixteen.¹⁰⁰ The court concluded that “[i]f elementary school children cannot be said to consent to sex in a criminal context, they similarly cannot be said to welcome it in a civil context. To find otherwise would be incongruous.”¹⁰¹ This reasoning is consistent with the Department of Education’s Guidance discussed below.

However, other courts do not apply criminal age of consent laws to civil litigation. The United States District Court for the Western District of Oklahoma, when considering a case involving a fourteen-year-old eighth grade student who “became sexually involved with her basketball coach,” decided that “the criminality of [the alleged harasser’s] actions, standing alone, have no bearing on the [defendant’s] liability.”¹⁰² The Northern District of Alabama has also identified the inconsistency in which courts address civil liability when, under criminal law, the student was legally incapable of consenting to a sexual relationship: “The court finds other districts have taken unreconcilable [sic] positions on the question of whether the inability to consent under criminal law renders voluntary actions non-consensual under federal civil law.”¹⁰³

State courts have also considered what weight the seemingly “voluntariness” of the sexual conduct between a student and teacher should have on civil liability. In *Christensen v. Royal School District No. 160*,¹⁰⁴ the Supreme Court of Washington addressed the question of whether a student’s voluntary participation in a sexual relationship can be an affirmative defense in a negligence action.¹⁰⁵ A teacher and thirteen-year-old student engaged in a sexual relationship with the sexual activity occurring in the teacher’s classroom.¹⁰⁶ The court decided that voluntariness or consent was not an affirmative defense because

the societal interests embodied in the criminal laws protecting children from sexual abuse should apply equally in the civil arena when a child seeks to obtain redress for harm caused to the child by an adult

100. *Id.*

101. *Id.* Other courts have also concluded that age of consent laws should have great bearing on the issue of welcomeness. See *Bostic v. Smyrna Sch. Dist.*, No. 01-0261 KAJ, 2003 WL 723262, at *6 (D. Del. Feb. 24, 2003) (“It would be a bizarre rule indeed that, for purposes of civil liability, would call a teenager’s ‘consent’ sufficient to make a relationship ‘welcome’ and thus not a basis for civil liability, when the very same relationship is rape under the exacting standards for criminal liability.”).

102. *R.L.R. v. Prague Pub. Sch. Dist.* I-103, 838 F. Supp. 1526, 1527, 1534 (W.D. Okla. 1993). See *Benefield v. Bd. of Trs. of the Univ. of Ala. at Birmingham*, 214 F. Supp. 2d 1212, 1217-18 (N.D. Ala. 2002) (quoting *R.L.R.* with approval and rejecting the plaintiff’s argument that “the sex in question could not be consensual because the plaintiff was below the age of consent at the time the acts in question occurred”).

103. *Benefield*, 214 F. Supp. 2d at 1217 n.12.

104. 124 P.3d 283 (Wash. 2005).

105. *Id.* at 285.

106. *Id.*

perpetrator of sexual abuse or a third party in a position to control the conduct of the perpetrator.¹⁰⁷

The court also rejected any claim that the student had a duty to protect herself from abuse by a teacher because it conflicted with Washington law that “a school district has an enhanced and solemn duty to protect minor students in its care.”¹⁰⁸ Other state courts have reached similar conclusions that evidence of consent or voluntariness is as inadmissible in a civil case as in a criminal case when a child is under the age of consent.¹⁰⁹

B. The Department of Education Sexual Harassment Guidance

The Department of Education describes itself as “the agency of the federal government that establishes policy for, administers, and coordinates most federal assistance to education.”¹¹⁰ Its mission “is to serve America’s students—to ensure that all have equal access to education and to promote excellence in our nation’s schools.”¹¹¹ One of the ways in which the Department of Education accomplishes its mission is by “identif[ing] the major issues and problems in education and focus[ing] national attention on them” by “mak[ing] recommendations for education reform.”¹¹²

In 2001, the Department of Education published “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties” (Guidance).¹¹³ This Guidance replaced its 1997 predecessor which was published pre-*Gebser*¹¹⁴ and pre-*Davis*.¹¹⁵ The stated purpose of the Guidance is “to provide the principles that a school should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving [f]ederal financial assistance.”¹¹⁶ In other words, the Guidance advocates policies for schools to follow in order to safeguard the federal funds they receive. The Guidance defines sexual harassment as

107. *Id.* at 286.

108. *Id.*

109. *See Doe ex rel. Roe v. Orangeburg County Sch. Dist. No. 2*, 518 S.E.2d 259, 262 (S.C. 1999) (holding that evidence of the plaintiff’s willing participation in a sexual relationship is inadmissible when the plaintiff is under the age of consent); *Wilson v. Tobiasen*, 777 P.2d 1379, 1384 (Or. Ct. App. 1989) (holding that “a person’s incapacity to consent under [the Oregon criminal code] extends to civil cases”).

110. United States Dep’t of Educ., An Overview of the U.S. Department of Education, <http://www.ed.gov/about/overview/focus/whattoc.html?src=ln> (last visited Mar. 12, 2009).

111. United States Dep’t of Educ., What Is the U.S. Department of Education?, <http://www.ed.gov/about/overview/focus/what.html#whatis> (last visited Mar. 12, 2009).

112. United States Dep’t of Educ., What Does the Department of Education Do?, http://www.ed.gov/about/overview/focus/what_pg2.html (last visited Mar. 12, 2009).

113. DEP’T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at i.

114. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

115. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999).

116. DEP’T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at i.

“unwelcome conduct of a sexual nature.”¹¹⁷ It can include “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”¹¹⁸ The Guidance then links sexual harassment to sex discrimination by explaining that harassment “can deny or limit, on the basis of sex, [a] student’s ability to participate in or to receive benefits, services, or opportunities in the school’s program. Sexual harassment of students is, therefore, a form of sex discrimination prohibited by Title IX under the circumstances described in this guidance.”¹¹⁹

Regarding welcomeness, the Guidance states that “[c]onduct is unwelcome if the student did not request or invite it and ‘regarded the conduct as undesirable or offensive.’ Acquiescence in the conduct or the failure to complain does not always mean that the conduct was welcome.”¹²⁰ Especially relevant to the issue of welcomeness and secondary students, the Guidance then explains that

[i]f younger children are involved, it may be necessary to determine the degree to which they are able to recognize that certain sexual conduct is conduct to which they can or should reasonably object and the degree to which they can articulate an objection. Accordingly, [the] OCR [Office of Civil Rights] will consider the age of the student, the nature of the conduct involved, and other relevant factors in determining whether a student had the capacity to welcome sexual conduct.¹²¹

After describing how it determines when a student has the capacity to welcome sexual conduct, the Guidance divides students into three categories: elementary, secondary, and postsecondary.¹²² Elementary students unequivocally cannot consent to a sexual relationship with a teacher: “OCR [the Office of Civil Rights] will never view sexual conduct between an adult school employee and an elementary school student as consensual.”¹²³ Regarding relationships involving postsecondary students, there is no mention of a presumption of consent or non-consent; rather, the Guidance states that “OCR will consider these factors in all cases involving postsecondary students.”¹²⁴

The issue of consent is clouded with respect to secondary students. “[T]here will be a strong presumption that sexual conduct between an adult school employee and a [secondary] student is not consensual.”¹²⁵ The “OCR will consider a number of factors in determining whether a school employee’s sexual

117. *Id.* at 2.

118. *Id.*

119. *Id.*

120. *Id.* at 7-8 (quoting *Does v. Covington Sch. Bd. of Educ.*, 930 F. Supp. 554, 569 (M.D. Ala. 1996)).

121. *Id.* at 8.

122. *Id.*

123. *Id.*

124. *Id.* The factors referred to are “the age of the student, the nature of the conduct involved, and other relevant factors.” *Id.*

125. *Id.*

advances or other sexual conduct could be considered welcome,”¹²⁶ with respect to the secondary students subject to this presumption.

The factors that will be considered in determining whether the relationship between the secondary student and teacher is welcome include “the nature of the conduct and the relationship of the school employee to the student” and “whether the student was legally or practically unable to consent to the sexual conduct in question.” The student’s age or certain types of disabilities will thus be important.¹²⁷

The Guidance then lays out a totality of the circumstances test, outlining “types of information [that] may be helpful in resolving the dispute” over whether harassment occurred or whether it was welcome.¹²⁸ The types of relevant information include: witness statements; “[e]vidence about the relative credibility of the allegedly harassed student and the alleged harasser”; whether the alleged harasser had harassed others; whether the student previously made false allegations; the student’s reaction after the alleged harassment; whether the student filed a complaint or otherwise protected the conduct after the alleged harassment; and other contemporaneous evidence.¹²⁹

IV. PROBLEMS WITH EVALUATING WHETHER A SECONDARY STUDENT “WELCOMED” A SEXUAL RELATIONSHIP WITH A TEACHER

There are many problems with the courts’ and the Department of Education’s approach to welcomeness and secondary students. The *Chancellor* court identified several flaws in the Guidance itself and other courts have identified problems with engaging in a welcomeness inquiry when students are involved. Among these criticisms, the most pressing are: (1) the problem with equating consent with the capacity to consent;¹³⁰ (2) the problems that arise when applying Title VII standards to Title IX cases;¹³¹ and (3) the problems associated with subjecting secondary students, some as young as fourteen, to the intense scrutiny of a welcomeness inquiry.¹³²

A. *Consent Versus Capacity to Consent*

The Guidance pays lip service to the principle of legal capacity to consent.¹³³ The Guidance states that “[w]hether the student was legally or practically unable

126. *Id.*

127. *Id.*

128. *Id.* at 9.

129. *Id.*

130. See *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 707 (E.D. Pa. 2007); see also Drobac, *Developing Capacity*, *supra* note 47, at 57-59 (arguing that “[a]dolescents are, in every way, embryonic human adults. Since we cannot tell whether an adolescent behaves maturely at any given time, we cannot tell which ‘consent’ we should treat as legally binding”).

131. See *Chancellor*, 501 F. Supp. 2d at 707.

132. Duffy, *supra* note 73, at 510.

133. DEP’T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at 8.

to consent to the sexual conduct in question” is a factor to be used to determine “whether a school employee’s sexual advances or other sexual conduct could be considered welcome.”¹³⁴ Whether a student was legally unable to consent should not be a factor in determining whether the relationship can be considered welcome. If a student is unable to legally consent to the relationship, the relationship should be automatically considered unwelcome. When considering this flaw, it is important to remember that consent is very closely related to the issue of welcomeness. Welcomeness is an element of a *prima facie* case of sexual harassment.¹³⁵ Indeed, the Guidance defines sexual harassment as “unwelcome conduct of a sexual nature.”¹³⁶

Although the Guidance does not explicitly state how it will determine whether a student was legally able to consent to the alleged sexual conduct, it appears that this age will be determined in light of statutory rape statutes or age of consent statutes in the jurisdiction in which the sexual conduct occurred. These laws are inconsistent across the states,¹³⁷ and using the laws as a marker for when a student can consent to a sexual relationship with a teacher would result in the possibility that any high school student, from freshman year through senior year, could have the legal capacity to consent to sex.¹³⁸ The age at which a student is protected would be entirely dependent on the jurisdiction in which she lives.¹³⁹ While it is true that this already occurs across the country due to the varied laws, the severity of the circumstances that surround sexual relationships between students and teachers require a different approach. A bright line rule that protects *all* secondary students, regardless of relevant age of consent laws, easily can be achieved by making all students incapable of consenting to a sexual relationship with a teacher.

The Guidance is not binding on courts, as noted by the court in *Chancellor*.¹⁴⁰ The Guidance “re-grounds [the] standards in the Title IX regulations, distinguishing them from the standards applicable to private litigation for money damages.”¹⁴¹ However, it can affect how courts view the issue of welcomeness and the capacity to consent because it is offered, by its very title, as guidance. Additionally, because it is meant as a guide to schools, the Guidance could greatly affect how school districts address sexual harassment. Therefore, because of its great influence, the Guidance should be revised.

134. *Id.*

135. *See Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 467-68 (8th Cir. 1996), *rev’d on other grounds*, 171 F.3d 607 (8th Cir. 1999).

136. DEP’T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at 2.

137. For further discussion, see *supra* Part I.B.

138. Professor Drobac acknowledges the same result when discussing sexual harassment of minors under Title VII. Drobac, *Developing Capacity*, *supra* note 47, at 7-8.

139. *Id.*

140. 501 F. Supp. 2d 695, 707 n.13 (E.D. Pa. 2007) (“The DOE’s Sexual Harassment Guidance provides just that: guidance. It is not binding on this Court, but rather a resource on the DOE’s position.”)

141. DEP’T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at i.

B. Problems with Applying Title VII Welcomeness Jurisprudence to Title IX

The numerous differences between a Title VII employment discrimination case and a Title IX school discrimination case make the direct application of Title VII standards of welcomeness to Title IX cases unworkable.

In a successful Title VII hostile work environment harassment claim, a plaintiff must show that: “(1) the employee belonged to a protected group, (2) the employee was the subject of unwelcome sexual harassment, (3) the harassment complained of was based on sex, [and] (4) the harassment was sufficiently severe to unreasonably interfere with work performance or create an intimidating, hostile, or offensive work environment.”¹⁴² In Title VII cases, the issue of whether the allegedly harassed employee has the capacity to welcome sexual harassment rarely arises. Instead, it is a question of whether the employee actually welcomed the specific alleged harassment.¹⁴³ However, in some Title VII cases, courts have expressed mild concern over the capacity to consent when minor employees are involved. The Seventh Circuit stated in *Doe v. Oberweis Dairy*¹⁴⁴ that courts “should defer to the judgment of average maturity in sexual matters that is reflected in the age of consent in the state in which the plaintiff is employed. That age of consent should thus be the rule of decision in Title VII cases.”¹⁴⁵

While the Seventh Circuit’s statement in *Oberweis Dairy* would appear to make welcomeness in Title VII cases involving minors an issue of capacity to consent, the Seventh Circuit did not end its analysis there. The court explained in dicta that although many problems exist with inquiring about an individual minor’s maturity, “a jury should be able to sort out the difference between an employer’s causal contribution to the statutory rape by its employee of a 16-year-old siren (if that turns out to be an accurate description of [the plaintiff]) and to similar conduct toward, say, a 12-year-old.”¹⁴⁶ The court envisioned a jury applying this difference when determining damages. Pursuant to the Seventh Circuit’s view of teenage sexuality, a teenaged student’s damage award for sexual harassment could be reduced simply because current fashion includes body-baring clothing, which could qualify the student as a “siren.”

While the Seventh Circuit’s troubled conclusion has no effect on criminal

142. Sara L. Johnson, Annotation, *When is Work Environment Intimidating, Hostile, or Offensive, so as to Constitute Sexual Harassment in Violation of Title VII of Civil Rights Act of 1964, as Amended* (42 U.S.C.A. §§ 2000e et seq.), 78 A.L.R. FED. 252 (1986).

143. See *Chancellor*, 501 F. Supp. 2d at 707 (“[U]nder Title VII, the question is not whether the subordinate employee had the capacity to welcome the superior’s sexual advances, but rather whether the subordinate in fact did so.”).

144. 456 F.3d 704 (7th Cir. 2006).

145. *Id.* at 713. For a discussion of *Oberweis Dairy* before the court announced the decision, see Jennifer A. Drobac, ‘Please Don’t; I Have My Standards!’, 27 BNA’S EMP. DISCRIMINATION REP. 55 (2006).

146. *Doe*, 465 F.3d at 715.

prosecutions for statutory rape, the holding can decrease the damages that an abused minor can collect. This problem, exhibited in Title VII cases, showcases the exact problem that will arise from the Department of Education's totality-of-the-circumstances test. Allowing a jury or court to consider the individual student's maturity undermines even the small protection that statutory rape laws provide students. These laws are in place because of the belief that children under a certain age are incapable of making a reasoned decision about sex. It is inconsistent, for a minor not to have the capacity to consent to sex in criminal proceedings, but for the same minor to have the capacity to welcome sexual harassment in a civil proceeding.¹⁴⁷ The law should not change based on whether the proceeding is civil or criminal; either an individual has the capacity to welcome sexual conduct or he or she does not.

As the *Chancellor* court noted, any totality-of-the-circumstances test is likely to reach logically ridiculous conclusions:

Under the DOE Sexual Harassment Guidance's factors for "welcomeness," a high school teacher's having sex with some students might violate Title IX, while the same teacher's having sex with other students in the same class, because they are of a different age or mental capacity or the sex occurs under slightly different circumstances, would not.¹⁴⁸

This difference in treatment already occurs in statutory rape law. "The system (criminal or civil), the geographic region (or jurisdiction), and the particular claims alleged all influence the legal treatment of adolescent 'consent.' A teenager in California can expect very different treatment than a teenager in Colorado, where the 'age of consent' is three years lower."¹⁴⁹ While these differences in the outcomes of very similar cases are a direct consequence of the fact that statutory rape laws are state laws and thus differ state-to-state. This difference in treatment should be rectified by state law or an established standard followed by all federal courts in Title IX cases to better protect all students. At the very least, a situation involving two students who are both above the age of consent and who are engaged in a sexual relationship with the same teacher should never result in a ruling that one student welcomed the conduct and the other did not. The Department of Education should act to protect students, not just teachers and school districts, and make a bright line rule: students do not have the legal capacity to consent to sex with their teachers, and thus any sexual

147. See *Bostic v. Smyrna Sch. Dist.*, No. 01-0261 KAJ, 2003 WL 723262, at *6 (D. Del. Feb. 24, 2003) ("It would be a bizarre rule indeed that, for purposes of civil liability, would call a teenager's 'consent' sufficient to make a relationship 'welcome' and thus not a basis for civil liability, when the very same relationship is rape under the exacting standards for criminal liability."); see also *Duffy*, *supra* note 73, at 510 ("The current legal situation creates the illogical possibility . . . that one could be convicted of child molestation and not be responsible for sexual advances under Title IX.").

148. *Chancellor*, 501 F. Supp. 2d at 707-08.

149. *Drobac*, *Developing Capacity*, *supra* note 47, at 7-8.

conduct is unwelcome on the part of the student for purposes of Title IX sexual harassment suits.

*C. Teacher-Student Relationships Should be Considered Custodial and
Consequently Deserving of More Protection*

The court in *Chancellor* briefly identified the custodial nature of the student-teacher relationship when it addressed whether the student had the capacity to consent to sex with her teacher.¹⁵⁰ The court stated, "the custodial situation, in which the aggressor, by virtue of his position of custody or authority over the aggrieved party, renders the aggrieved party incapable of offering her effective consent."¹⁵¹ The court then analogized the custodial relationship of prisoners and prison guards.¹⁵²

In situations involving sexual abuse outside of custodial relationships, consent is usually a highly disputed issue. However, in a custodial relationship, "consent is a legal impossibility: the federal government, the District of Columbia, and forty-seven states now criminalize sexual contact between correctional staff and prisoners These statutes are formulated on the belief that the power imbalance between guard and guarded renders true consent impossible."¹⁵³ In this custodial situation, "[t]here is widespread agreement both domestically and internationally that rape simply is 'not part of the penalty' offenders should pay for their criminal conduct."¹⁵⁴

While the realities of life in prison are very different than the public school setting, there are enough similarities to argue that teachers and students are in a custodial relationship.¹⁵⁵ Attendance in school is compulsory.¹⁵⁶ Power over bathroom passes, when the student can speak in class, and what grade the student receives, are all examples of how a teacher exercises great authority over the

150. *Chancellor*, 501 F. Supp. 2d at 705.

151. *Id.*

152. *Id.*

153. Deborah M. Golden, *It's Not All in My Head: The Harm of Rape and the Prison Litigation Reform Act*, 11 CARDOZO WOMEN'S L.J. 37, 39-40 (2004). See also 18 U.S.C. § 2243(b) (2006).

Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in a sexual act with another person who is (1) in official detention; and (2) under the custodial, supervisory, or disciplinary authority of the person so engaging; or attempts to do so, shall be fined under this title, imprisoned not more than 15 years, or both.

Id.

154. Golden, *supra* note 153, at 38 (quoting *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)).

155. See *Chancellor*, 501 F. Supp. 2d at 705.

156. See statutes cited *supra* note 71.

student's direct actions, and can influence the student's future.¹⁵⁷

The Supreme Court has acknowledged the custodial aspect of the teacher student relationship: "[T]he nature of the power over students 'is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.'"¹⁵⁸ The term "custodial relationship" denotes that a certain amount of responsibility attaches to the custodian. "[W]hen the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."¹⁵⁹ When a teacher takes on the awesome responsibility of caring for another's child for more than six hours a day, it is reasonable to give those students the same rights afforded to prisoners.¹⁶⁰ The teacher has a duty to assume some responsibility for the child's safety and general well-being. This is not achieved through sexual relationships with those students.

The state of Georgia has explicitly recognized the similarities between the custodial teacher-student relationship and the relationship between correctional staff and prisoners.¹⁶¹ In a case before the Supreme Court of Georgia, an assistant high school principal allegedly engaged in sexual acts with a student enrolled in the high school.¹⁶² The principal was indicted under a criminal statute that stated that a "custodian or supervisor of another person . . . commits sexual assault when he or she engages in sexual contact with another person who is . . . enrolled in a school . . . and such actor has supervisory or disciplinary authority over such other person."¹⁶³ The defendant-principal challenged the statute on vagueness and constitutionality grounds, but the court ultimately upheld the statute.¹⁶⁴

The importance of this statute is revealed when the other custodial or supervisory relationships listed in the statute are analyzed.¹⁶⁵ In full, the statute states:

A probation or parole officer or other custodian or supervisor of another person referred to in this Code section commits sexual assault when he

157. See Graham, *supra* note 70, at 594-96 ("[A] teacher does more than give grades. Teachers are charged with the supervision of children and are directed to create a safe environment conducive to education." (citing Neera Rellan Stacy, Note, *Seeking a Superior Institutional Liability Standard Under Title IX for Teacher-Student Sexual Harassment*, 71 N.Y.U. L. REV. 1338, 1375 (1996))).

158. DeMitchell, *supra* note 43, at 24-25 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)).

159. *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 199-200 (1989).

160. See *Chancellor*, 501 F. Supp. 2d at 705.

161. GA. CODE ANN. § 16-6-5.1(b) (West 2003 & Supp. 2007).

162. *Randolph v. State*, 496 S.E.2d 258, 260 (Ga. 1998).

163. GA. CODE ANN. § 16-6-5.1(b) (West 2003 & Supp. 2007).

164. *Randolph*, 496 S.E.2d at 260.

165. See *Chancellor*, 501 F. Supp. 2d at 705.

or she engages in sexual contact with another person who is a probationer or parolee under the supervision of said probation or parole officer or who is in the custody of law or who is enrolled in a school or who is detained in or is a patient in a hospital or other institution and such actor has supervisory or disciplinary authority over such other person.¹⁶⁶

The statute groups persons in the custody of the law in with persons enrolled in a school. This illustrates the Georgia legislature's cognizance that the issue of consent is clouded when there is a great power disparity between the persons involved in the sexual act.

D. Students Should Not be Subjected to the Strict Scrutiny a Welcomeness Investigation Would Require

The factors listed in the Guidance that describe the way in which welcomeness should be evaluated are extensive and burdensome.¹⁶⁷ An examination of witness statements, evidence of credibility, the student's reaction, and other contemporaneous factors could result in intense scrutiny of the student.¹⁶⁸ Not only does the very idea of weighing a student's reaction to a sexual relationship with her teacher seem nonsensical, it is persuasive support that all sexual relationships between students and teachers should be deemed unwelcome. If a court followed the Guidance and evaluated the "types of information" suggested by it, the court will likely question how a student reacted to sexual harassment.

These factors show a misunderstanding of the welcomeness requirement. The logic behind age of consent laws and rules surrounding the execution of contracts by minors is that those children below the applicable age do not have the capacity to understand the gravity of their decisions. Legislatures have made the decision to protect the minors from themselves. A student's reaction to a sexual relationship with her teacher varies immensely. In one case, the student may attempt suicide or be "repeatedly hospitalized for psychiatric reasons."¹⁶⁹ In other cases, a student may defiantly assert that she consented to the relationship and her reaction only comes at the end of the relationship.¹⁷⁰ This analysis shows the need for a change in how the welcomeness requirement is

166. GA. CODE ANN. § 16-6-5.1(b) (West 2003 & Supp. 2007).

167. For a list of the factors, see DEP'T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at 8-9.

168. *Id.* at 9.

169. *Chancellor*, 501 F. Supp. 2d at 699.

170. See, e.g., Jennifer Ann Drobac, *Sex and the Workplace: "Consenting" Adolescents and a Conflict of Laws*, 79 WASH. L. REV. 471, 471-72 (2004) [hereinafter Drobac, *Sex and the Workplace*] (describing a case where a fifteen-year-old girl had sex with her forty-year-old manager after the manager told her he had a terminal brain tumor. The girl became pregnant and the manager's girlfriend took her to have an abortion. She refused to cooperate with the district attorney until the police told her that the manager did not have a brain tumor and had lied to her.).

viewed in Title IX cases. This type of examination should never occur. If all sexual relationships between school employees and secondary students were deemed unwelcome, this examination *would* never occur. In addition, this type of blanket rule would protect teachers and school districts. Even if a student tried to initiate a relationship with a teacher, the teacher would know unequivocally that it would not matter that the student voluntarily entered a relationship. The only thing that would matter is that he is a teacher and she is a student, and that relationship is one in which consent is a legal impossibility. The teacher would know that pursuing the relationship would subject the teacher to the possibility of a criminal conviction and both the teacher and school district to civil liability.

V. SOLUTIONS: PROTECT SECONDARY STUDENTS BY FINDING THAT THEY DO NOT HAVE THE CAPACITY TO WELCOME A TEACHER'S SEXUAL CONDUCT

A uniform, national standard is the most logical approach to determining whether a student can welcome the sexual harassment of a teacher. At the very least, all courts should find that the relevant age of consent law controls in a Title IX case where the issue of welcomeness is disputed. An even better solution is that the element of welcomeness is met in every case where a secondary student and teacher engage in a sexual relationship while that student is enrolled in the school where the teacher is employed.

A. *An Initial Step: Age of Consent Should Control*

The most expedient way to establish uniform protection for students is for the age of consent laws in the relevant jurisdiction to apply to Title IX cases, without exception. This protection should extend to exclude any evidence of purported welcomeness as it applies to liability or the level of damages. Without protection in both facets of a civil trial, the student's actions will come under strict scrutiny in an end-run maneuver that would circumvent the protection established by applying age of consent laws.

It is possible to remove the welcomeness requirement entirely from Title IX suits, but this is too drastic a step. Welcomeness should not be completely removed from Title IX analyses because of cases involving college and graduate students in which the majority of students are over the age of eighteen.¹⁷¹ While many arguments surrounding the power disparity between secondary students apply to college students as well, some of the most important arguments that protect secondary students do not. College is not compulsory, and college imbues students with many choices that are not given secondary students. Additionally, at some point a law that is meant to protect becomes stifling.¹⁷²

171. See Kaplin, *supra* note 56, at 628 ("Title IX, applies to all education institutions receiving federal funds, elementary/secondary and higher education alike.").

172. Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 AM. U.J. GENDER & L. 269, 300 (1996) ("In arguing that women lack capacity to consent to particular sexual relationships, and that we may disregard the woman's own

This is likely to occur in Title IX cases if college students are deemed to be legally incapable of welcoming a sexual relationship with a professor.¹⁷³ Although there are certainly predatory professors at universities, the welcomeness requirement would sufficiently protect these older students.¹⁷⁴ If the student did not welcome the conduct, then he or she can present evidence to support that assertion.

B. The Next Step: Protect All Secondary Students, Regardless of Relevant Age of Consent Laws

Using age of consent laws to remove any question of welcomeness for students who have not reached the age of consent is a step in the right direction, but it is not sufficient. The best protection is to extend the protection currently given to elementary students to include secondary students, never considering a relationship between a teacher and student as consensual or welcome.¹⁷⁵

Professor Jennifer Ann Drobac argues for more protection of adolescents within the employer-employee relationship under Title VII.¹⁷⁶ She advocates for law reform and legal regulation that makes an adult's sexual harassment of a minor a "strict liability offense for which consent is no defense" and encourages this reform to be influenced by the scientific evidence of adolescent development.¹⁷⁷ Professor Drobac proposed making adolescent consent voidable in much the same way that contract law protects minors by making their consent to a contract voidable.¹⁷⁸

perception that this relationship is one that she has chosen and continues to value, proponents of consensual relationship policies disregard a fundamental principle of feminism.").

173. *Id.* at 299 (Policies that ban consensual relationships between professors and students do not "address a situation where there has been an abuse of power, nor do they increase the power or control of the [students] they are allegedly designed to protect. Instead, [these] policies presume that the [students] are incapable of exercising responsible choice, and so deprive them of any choice at all.").

174. *Id.* at 279 ("Consensual relationships, by definition, fall outside Title IX's prohibition of sexual conduct that is 'unwelcome.' Therefore, banning consensual relationships should not have any impact on the institution's legal liability.").

175. See DEP'T OF EDUC., SEXUAL HARASSMENT GUIDANCE, *supra* note 17, at 8 (conclusively stating that relationships between teachers and elementary students will never be viewed as consensual).

176. See Drobac, *Developing Capacity*, *supra* note 47, at 1-2; Jennifer Ann Drobac, *I Can't to I Kant: The Sexual Harassment of Working Adolescents, Competing Theories and Ethical Dilemmas*, 70 ALB. L. REV. 675, 681-82 (2007) [hereinafter Drobac, *I Can't to I Kant*]; Drobac, *Sex and the Workplace*, *supra* note 170, at 473.

177. Drobac, *Sex and the Workplace*, *supra* note 170, at 543. Professor Drobac explains the importance of understanding the developing mental capacity of teenagers by using the simple explanation that "[a]nyone who has bought shoes for a teenager knows that adolescents mature and grow with astonishing rapidity." *Id.* at 541.

178. *Id.* at 544-45. She explains:

Professor Drobac's proposal—making sexual harassment of minors under Title VII a strict liability offense—certainly offers a high level of protection from sexual abuse. However, the differences that exist between Title VII and Title IX are significant, and these differences require a different approach under Title IX. Here, the most important difference is the standard used in determining liability. A sexual harassment claim under Title IX falls under the “actual knowledge” standard set out by the Supreme Court in *Gebser*¹⁷⁹ and a school district is the only proper defendant in a Title IX action brought by a secondary student.¹⁸⁰ A sexual harassment claim under Title VII is based on common law agency principles, which provide more protection for employees than students.¹⁸¹ While the actual knowledge standard established by the Supreme Court in *Gebser* has been harshly criticized, some valid reasons exist for such a standard.¹⁸² If a school district truly did not know of a sexual relationship occurring between a student and a teacher, then holding the school district liable for the actions of a teacher may accomplish little.¹⁸³ The congressional intent behind Title IX was to prevent federal funding of sexual discrimination in the nation's schools.¹⁸⁴ An explicit private right of action does not exist in Title IX as it does in Title VII.¹⁸⁵

An adolescent might still choose to engage in sex with an adult co-worker, who would still run the risk of civil and criminal liability. In essence, this scheme operates like adolescent “consent” to a contract. The sex “contract” is voidable by the adolescent but not void. The adolescent can retract the consent if she realizes during her minority (or shortly thereafter) that her adult partner took advantage of her “developing capacity” at the workplace.

Id.; see also Drobac, *I Can't to I Kant*, *supra* note 176, at 739.

179. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290-91 (1998). The Court explained its holding by stating:

[A] damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond [M]oreover . . . the response must amount to deliberate indifference to discrimination.

Id. at 290.

180. See Kaplin, *supra* note 56, at 630-31 (“It is now generally accepted that Title IX creates liability only for the educational institution itself. Individual employees are not themselves ‘education program[s] or activit[ies],’ nor do they ‘receiv[e] Federal financial assistance;’ they are therefore outside the scope of Title IX.” (alterations in original)).

181. Graham, *supra* note 70, at 588-89. As Graham notes, the Supreme Court decisions announcing this standard came out the same week as *Gebser*. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

182. See *Gebser*, 524 U.S. at 291-92. The author of this Note agrees that the actual knowledge requirement is misguided, but that is beyond the scope of this Note.

183. The Supreme Court acknowledged this reason in support of its holding in *Gebser*. *Gebser*, 524 U.S. at 285-86.

184. See *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

185. Compare 20 U.S.C. § 1681(a) (2006), with 42 U.S.C. § 2000e-5 (2006).

Students can sue under Title IX because the Supreme Court determined that an implied private right of action exists.¹⁸⁶ The differences in the basis of the rights of action and in the proper defendants create at least some explanation for the differences in standard. This was the reasoning behind the Supreme Court's decision in *Gebser* and its adoption of an actual knowledge standard: "Under a lower standard, there would be a risk that the recipient [of federal funds] would be liable in damages not for its own official decision but instead for its employees' independent actions."¹⁸⁷

In light of the Supreme Court's actual knowledge standard for Title IX sexual harassment, a strict liability approach is unlikely to gain traction. The better approach under Title IX is for courts and the Department of Education to establish a rule that sex with a secondary student of any age is conclusively unwelcome. This creates a "strict liability" approach only to the unwelcomeness requirement of a successful Title IX sexual harassment claim. A student would still have to prove actual knowledge by the school district.

This proposal may seem too small a step to truly impact Title IX sexual harassment litigation. It is true that this proposal does not seek to change the actual knowledge standard set by the Supreme Court that protects employees more than school children and this standard in and of itself creates many problems for students claiming sexual harassment.¹⁸⁸ But this proposal is a manageable and attainable step that does not require overturning Supreme Court precedent that has now been in place for ten years.¹⁸⁹ By making all sexual relationships between students and teachers unwelcome as a matter of law and policy, students will be protected from their own immaturity, the intense scrutiny of a welcomeness examination, and unnecessary and harmful sexualization that already pervades our culture.¹⁹⁰

A problem arises when viewing sexual relationships between eighteen-year-old secondary students and teachers.¹⁹¹ Eighteen-year-old students are legally adults and are of the age of consent under any state's relevant statute. Setting the age of consent to eighteen for all sexual activities may seem extreme and could do more harm than good.¹⁹² Adolescence is a time for sexual exploration. Nonetheless, protection from sexual activities in this circumstance, a sexual relationship with a teacher, does not have the same consequences as removing the capacity to consent in all relationships. A clear-line rule can be established. A student, regardless of age, cannot legally consent to a sexual relationship with his

186. See *Cannon*, 441 U.S. at 699.

187. *Gebser*, 524 U.S. at 290-91.

188. Graham, *supra* note 70, at 586-87.

189. See *Gebser*, 524 U.S. at 274. The *Gebser* decision was announced on June 22, 1998.

190. See Drobac, *I Can't to I Kant*, *supra* note 176, at 730; see also *id.* at 730 n.282.

191. See Drobac, *Developing Capacity*, *supra* note 47, at 59. Professor Drobac supports the age of majority to be set to twenty-one years of age, but acknowledges that this is politically impossible. She advocates the age of consent to be set to eighteen years of age at the youngest.

192. See *id.* ("If we raise the age of consent, however, we may preclude adolescents from engaging in the experimentation that they need to build wisdom.").

or her teacher when the teacher is employed at the student's school. By limiting the breadth of this clear-line rule to include only relationships with teachers, the zone of protection is limited to an area of undeniable importance.

CONCLUSION

Congress created Title IX to prevent discrimination in schools receiving federal funds and to protect individuals from discrimination.¹⁹³ The enactment of Title IX is best known for its effects on athletics, specifically the drastic increase in female participation in athletics.¹⁹⁴ In the last two decades, Title IX's application to sexual relationships between students and teachers and the relevant standards have been decided by the Supreme Court.¹⁹⁵ The Supreme Court did not take advantage of the opportunity to protect high school students,¹⁹⁶ and courts and the Department of Education have not taken the necessary additional steps.

The protection of children should be of utmost concern. There are too many examples of teacher-student sexual relationships, from case law and popular media, to ignore the problem of teachers taking advantage of students.¹⁹⁷ Students attend school to learn and should never be subjected to abuse. Additionally, a parent should never have to worry that his or her fifteen-year-old child, however mature and knowledgeable the child seems, could someday be scrutinized to a damaging degree, questioning the child's clothes, maturity, and

193. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

194. Suzanne E. Eckes, *Title IX and High School Opportunities: Issues of Equity On and Off the Court*, 21 WIS. WOMEN'S L.J. 175, 175 (2006) ("For high school girls, the number who participated in sports rose by approximately 850%, from 294,015 in 1972 to over 2.8 million in 2002." (citing Ellen Staurowsky, *Title IX in its Third Decade: The Commission on Opportunity in Athletics*, 2 ENT. L. 70, 72 (2003))).

195. See *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

196. See *Gebser*, 524 U.S. at 306 (the dissent stated that "the Court ranks protection of the school district's purse above the protection of immature high school students").

197. See, e.g., Eleanor Chute, *Ex-Moon Area Teacher to Stand Trial in Sex Case*, PITTSBURGH POST-GAZETTE, Jan. 23, 2008, at B-3 (twenty-six-year-old teacher admitted having sex with fourteen-year-old freshman); Jim O'Neill, *His First Day in Court: Bail Set for Teacher in Sexual Assault*, STAR-LEDGER, Jan 31, 2008, at 27 (thirty-seven-year-old teacher and girls soccer coach accused of sexual relationship with seventeen-year-old student); Jennifer Radcliffe, *Parents Updated on Teacher Arrest: Spring District Mails Out Letters in Latest Sex Case*, HOUS. CHRON., Jan 9, 2008, at B1 (reporting on three teachers in same Texas school district in which one teacher was accused of asking a student where to buy marijuana and later beginning sexual relationship with him; one teacher was accused of inappropriately touching an eighteen-year-old student in a school barn; and one teacher was accused of performing oral sex on a sixteen-year-old student inside a locked classroom). In this last case, one can almost hear the defense that perhaps students in this particular school district are extremely mature and seek out sexual relationships with teachers.

any other relevant fact under a “totality of the circumstances” *after* the child has endured a sexual relationship with a teacher.

A solution to this problem is to conclude that all sexual relationships between teachers and secondary students are unwelcome. This solution prevents students from the traumatic experience of trying to prove they did not welcome the relationship, and it prevents teachers and school districts from avoiding liability if a student believes the relationship was welcome. Even if a student believes she welcomed the relationship, the law will consider this irrelevant because a student does not have the capacity to welcome sexual conduct. If this is too drastic a solution for some, then at least age of consent laws should control and any relationship a teacher engages in with a student under that age of consent should be conclusively unwelcome in a Title IX claim.

This proposed solution is not much to ask. While the term “students” is used throughout this Note, these “students” are children who do not understand much about the world.¹⁹⁸ This proposal does not take much protection from school districts because students would still have to show actual knowledge and deliberate indifference.¹⁹⁹ This proposal attempts to protect the child, the secondary high school student, who may find herself in the middle of a Title IX case. After all, protecting students, nurturing their development and growth, is the responsibility of teachers. When that fails, protection should be in place. A student like Jeanette Chancellor, who had a long term sexual relationship with her band teacher and consequently attempted suicide and was hospitalized,²⁰⁰ should never have to explain that she did not welcome the sexual harassment perpetrated by her twenty-nine year old teacher.

198. Indeed, the Author remembers the reaction of adolescent boys when the infamous Mary Kay LeTourneau case hit the media. Many boys expressed the opinion that the sixth grade twelve-year-old boy was lucky to be in a sexual relationship with an adult female, and ridiculed the idea that they would come forward if they were so fortunate. See Angela Mosconi, *Report: Cradle-Rob Teacher Threatened to Castrate Teen Lover*, N.Y. POST, Feb 22, 1999, at 2 (recounting some of the details of the relationship between LeTourneau and the young student).

199. See *Gebser*, 524 U.S. at 274.

200. *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 699-704 (E.D. Pa. 2007).



